Supreme Court of the United States

OCTOBER TERM, 1966

No. 334

UNITED STATES, PETITIONER

vs.

BILLY JOE WADE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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[fol. 1]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

Criminal No. 6805

[File Endorsement Omitted]

UNITED STATES OF AMERICA

vs.

BILLY JOE WADE, THOMAS NORMAN BRIGGS,
and BILLY REX PICKETT

Vio. Ti. 18, U.S.C., Sec. 371
(Not more than $10,000 or not more than 5 years, or both)

INDICTMENT—Filed March 23, 1965

THE GRAND JURY CHARGES:

1. That for a period of time commencing shortly prior to September 16, 1964, and continuing to on or about September 21, 1964, Billy Joe Wade, Thomas Norman Briggs and Billy Rex Pickett, defendants herein, unlawfully, feloniously and knowingly conspired, combined and agreed, and confederated with each other to commit certain offenses against the United States, to wit, violations of Title 18, United States Code, Sections 2113(a) (b) (c) (d), that is, the said defendants conspired, combined, agreed and confederated with each other to use dangerous weapons, that is, pistols and such force, violence and intimidation necessary to take from the person and presence of any persons, money, belonging to and in the care, custody, control, management and possession of The First State Bank, Eustace, Texas, the deposits of which were then insured by the Federal Deposit Insurance Corporation.

2. That in the furtherance of said conspiracy and for the purpose of executing and effectuating the objects thereof, the defendants, Billy Joe Wade, Thomas Norman Briggs and Billy Rex Pickett, did commit, among divers other acts, the following overt acts within the Eastern District of Texas:

(a) A few days prior to September 16, 1964, Billy Joe Wade, Thomas Norman Briggs and Billy Rex Pickett, discussed and planned to rob The First State Bank, Eustace, Texas.

(b) On or about September 16, 1964, Billy Joe Wade and Thomas Norman Briggs drove from Mesquite, Texas, to the residence of Billy Rex Pickett, located near Sulphur Springs, Texas, where they joined the said Billy Rex Pickett.

[fol. 2] (c) On or about September 16, 1964, Billy Joe Wade, Thomas Norman Briggs, and Billy Rex Pickett acquired a 1964 model Falcon automobile at Emory, Texas, to be used as a "getaway car" in the robbery of The First State Bank, Eustace, Texas.

(d) On or about September 18, 1964, Billy Rex Pickett notified Thomas Norman Briggs by telephone that he was too well known in the area around Eustace, Texas, and feared that he would be recognized if he entered The First State Bank at Eustace, Texas, or was seen in the area immediately prior to or after the robbery of said The First State Bank, Eustace, Texas.

(e) On or about September 20, 1964, Billy Joe Wade and Thomas Norman Briggs drove from Mesquite, Texas, to Malakoff, Texas, and then on to Eustace, Texas, for the purpose of viewing The First State Bank, Eustace, Texas, and making further plans for the robbery of said bank.

(f) On or about September 21, 1964, Billy Joe Wade and Thomas Norman Briggs drove from Mesquite, Texas, in a 1964 Chevrolet Corvette automobile to a location approximately four (4) miles southeast of Eustace, Texas, where they parked the 1964 model Chevrolet Corvette and entered a 1964 model Falcon automobile, which they then drove to The First State Bank, Eustace, Texas.

COUNT TWO

Vio. Ti.18,U.S.C., Sec. 2113(d)

(Not more than $10,000 or not more than 25 years, or both)

THE GRAND JURY FURTHER CHARGES:

On or about the 21st day of September, 1964, in the Eastern District of Texas, Billy Joe Wade and Thomas Norman Briggs, by force and violence and by intimidation, did take from the person and presence of Lee Gray and Jean Chambers $14,870.00, in money, belonging to and in the care, custody, control, management and possession of The First State Bank, Eustace, Texas, the deposits of which were then insured by the Federal Deposit Insurance Corporation, and Billy Joe Wade and Thomas Norman Briggs, in committing the aforesaid acts, did assault Lee Gray and Jean Chambers, and put in jeopardy the lives of the said Lee Gray and Jean Chambers by [fol. 3] the use of a dangerous weapon, that is, a pistol, in violation of Title 18, United States Code, Section 2113 (d).

A TRUE BILL

/s/ [Illegible]
Foreman

/s/ Wm. Wayne Justice
WM. WAYNE JUSTICE
United States Attorney

/s/ H. D. Nicholson
H. D. NICHOLSON
Assistant U. S. Attorney

[fol. 5] Form No. 195

No. ——

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION

THE UNITED STATES OF AMERICA

vs.

BILLY JOE WADE, THOMAS NORMAN BRIGGS,
and BILLY REX PICKETT

INDICTMENT

Vio. Ti.18,U.S.C., Secs.371 2113(d)
Two Counts

A true bill,

.....

Foreman.

Filed in open court this ..... day of .....,
A. D. 19....

.....

Clerk.

Bail, $.....

.....

[fol. 6]

IN THE DISTRICT COURT OF THE
UNITED STATES
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

[File Endorsement Omitted]

[Title Omitted]

ORDER APPOINTING COUNSEL—April 26, 1965

On this the 26th day of April, 1965, Billy Joe Wade, one of the defendants in the above entitled cause, appeared in open court and advised the Court that he did not have an attorney to represent him in this cause, that he was financially unable to employ an attorney and that he desired to have an attorney oppointed to represent him, and the Court finding that the said Billy Joe Wade is financially unable to employ an attorney to represent him in this cause,

It is, therefore, ORDERED, ADJUDGED and DECREED that Weldon G. Holcomb, Esquire, a practicing attorney in Tyler, Texas, be, and he is hereby appointed to represent the defendant, Billy Joe Wade, in the above cause.

ENTERED this 26th day of April, 1965.

/s/ Joe W. Sheehy
United States District Judge

[fol. 6A]

IN THE DISTRICT COURT OF THE
UNITED STATES
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

Criminal Action No. 6805

UNITED STATES OF AMERICA, PLAINTIFF

vs.

BILLY JOE WADE, DEFENDANT

EXCERPTS FROM RECORD OF PROCEEDINGS

AT: TYLER, TEXAS
ON: AUGUST 2-4, and 30, 1965

[fol. 7] JEAN CHAMBERS,

having first been duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth, did testify as follows:

DIRECT EXAMINATION

BY MR. NICHOLSON:

Q Will you tell the Jury and the Court your name; please, ma'am?
A Jean Chambers.
THE COURT: What was that name; please, ma'am?
THE WITNESS: Jean Chambers.
THE COURT: Chambers?
THE WITNESS: Yes.

BY MR. NICHOLSON:

Q Where do you reside, Mrs. Chambers?
A In Eustace, Texas.
Q Do you have a family?
A Just my husband and myself.
Q Do you have a job or business?
A I work—I'm cashier at the First State Bank, Eustace.

[fol.8] Q How long have you been a cashier there, Mrs. Chambers?

A Since January the 2nd, 1947.

Q How old are you?

A Thirty-five.

Q You've worked at that bank some time, then; haven't you?

A Yes, sir.

Q Mrs. Chambers, how many people work in the bank?

A Mr. Gray and myself.

Q Who is Mr. Gray?

A He is the Vice-President.

Q Were you working at the Eustace bank in September of 1964?

A Yes, sir.

Q I direct—Directing your attention to Monday, the 21st of September, 1964, did anything unusual occur in the bank on that day?

A Yes, sir, we were robbed.

Q Approximately what time of the morning was it—Or, what time of the day—excuse me—was it you were robbed?

A Between nine-thirty and nine-thirty-five. Some-[fol. 9] where thereabouts.

Q Were you in the bank at that time?

A Yes, sir.

Q Was Mr. Gray in the bank at that time?

A Yes, sir.

Q Were you robbed by one man or more than one man—or one woman or more than one woman? Or, who were you robbed by?

A I only saw one man.

Q All right; and where was this man when you first observed him?

A He was coming through the front door.

Q Let me show you, Mrs. Chambers, what has been marked for identification purposes as Government's Exhibits 8, 9, 10 and 11, and ask you if you can recognize what each of these exhibits are?

REPORTER'S NOTE: Instruments were then handed to the witness.

(pause)

A Yes, sir.
Q What are these pictures of?
A The outside and inside of our bank.
Q Do these pictures accurately and truly portray the bank as it was on the day that you were robbed?
A Yes, sir.
[fol. 10] MR. NICHOLSON: Judge, we will offer these Government exhibits.
MR. HOLCOMB: No objection, Your Honor. I've already looked at them.
THE COURT: All right; you may pass them to the jury.

REPORTER'S NOTE: Instruments were then handed to the jury.

BY MR. NICHOLSON:

Q Looking to Government's Exhibit 10, where were you standing in regard—in regard to this picture when you first observed this man come through the front door?

REPORTER'S NOTE: An instrument was then displayed before the witness.

A Right here at the north end (indicating). There is a typewriter right—right behind this—this part here.
Q Right there (indicating)?

REPORTER'S NOTE: There was no audible response from the witness.

Q What is this right here (indicating)?
A That's the front of the counter.
THE COURT: A little louder, please, Mrs. Chambers.
[fol.11] A (repeating) The front of the counter.

BY MR. NICHOLSON:

Q And you were--
If we were looking into the picture, you were at the far end of the counter. Is that correct?
A Yes.
Q And what is this right here (indicating)?
A A swinging door.
Q That's the way you make access or entrance into the interior behind the bank?

A Yes.
Q The bar of the bank?
A Yes.
Q What does Government's Exhibit No. 8 portray?

REPORTER'S NOTE: An instrument was then handed to the witness.

A It's our vault door.
Q All right.
And is Government's Exhibit No. 8 the picture of—the picture of the vault door—is it also visible in Government's Exhibit No. 10?

REPORTER'S NOTE: An instrument was then handed to the witness.

A Yes.
Q Is it the door immediately in the center of the back [fol. 11] wall there (indicating)?
A Yes.
Q Government's Exhibit No. 9—the—it shows some doors. Are those the front doors of the bank?

REPORTER'S NOTE: An instrument was then displayed before the witness.

A Yes.
Q Is this the door that you referred to that you saw the man walking through?
A Yes.
Q Government's Exhibit No. 11:

REPORTER'S NOTE: An instrument was then displayed before the witness.

Q (continuing) If you—If you—
Can you tell approximately where that picture was taken from?
A Well, I would say it was directly in front of the bank.
Q What lies directly in front of the bank?
A Well—
Q (interrupting) By that, I mean is it an open field—a vacant lot?

A Yes.
Q Is it a square?
A No; it's an open—it's open right there—across from [fol. 12] the front of it.
Q In regard to Government's Exhibit No. 11, is there a Post Office in Eustace, Texas?
A Yes, sir, it's the second door from the bank.
Q And as—if you came out of the bank through the front door, which way would you turn to go to the Post Office?
A To the right.
Q All right.
Mrs. Chambers, I believe you testified that you were standing at the rear of the counter, back by the typing machine in close to the swinging doors. Is that correct?
A Yes.
Q When this man came through the front door?
A Yes.
Q Did the man—
What—Just tell what he did when he came through the front door.
A Well, he said he wanted to cash a check.
Q Where was he when he told you that he wanted to cash a check?
A Just as he entered the door.
Q What did you say to him at that time?
A I said, "Okay; let's see it." And he was coming [fol. 13] toward me then.
Q Did he come on back to you?
A You mean to—
I don't understand.
Q What did he do after you said, "Let's see it."?
A Oh, he was coming towards me all the time.
Q He never stopped walking?
A No.
Q He just continued to approach you?

(pause)

REPORTER'S NOTE: There was no audible response from the witness.

Q Did he do anything when you said, "Let's see it."?

A Well, the next time I looked up, I—I looked down—and the next time I looked up, well, he had taken a gun—or he had a gun in his hand.

Q Where was he standing when you—or—where was he when you noticed that he had a gun in his hand?

A He was about ten feet from me.

Q Do you recall what type of a gun it was that he had?

A Well, it was a nickle—silver nickle—or nickle plated gun.

Q I show you what has been marked as Government's [fol. 14] Exhibit 1 and ask you if—if that—

REPORTER'S NOTE: An object was then displayed before the witness.

Q (continuing)—does that look similar to the gun the man had?

A Yes, sir.

Q Do you recall which hand he was holding this gun in?

A In his right hand.

Q Do you recall anything unusual about the—the appearance of the man?

A Yes, sir; he had tape on his face.

Q Where was this tape on his face, Mrs. Chambers?

A Right along here (indicating). Right along here.

Q Did he have any—

Can you describe his clothing in any manner?

A Well, he had a grey—had grey khaki pants on and a long-sleeve sport shirt on—and a straw hat.

Q And the tape on his—

A (interrupting) Yes.

Q (continuing)—jaw?

After you noticed the gun what did he do then?

A Well, he came behind the swinging door into the bookkeeping department where I was.

[fol. 15] Q He came on into the—

How close was he to you then, or did—

Did he say anything to you when he went through those swinging doors?

A Yes.
He told me to move back—twice.
Q And did you move back?
A Yes.
Q How close did he approach you? Did—Did he—Did you stop, then, when you moved back?
A Yes, sir.
Q Did he—
How close did he come to you before he stopped?
A Well, he came right to me.
Q As close as from me to that rail (indicating)?
A Yes, sir; closer than that—when he got in front of me.
Q Was he holding the gun on you at that time?
A Yes, sir; he had it in his hand.
Q Do you see the man in this courtroom, Mrs. Chambers, that robbed you that morning?
A Yes, sir.
Q Would you point him out; please?
A Yes, sir.

REPORTER'S NOTE: The witness indicated by [fol. 16] a motion with her hand in the general direction of the Defendant.

Q Are you making reference to the second gentleman seated here at the table (indicating)?
A Yes; in the blue suit.
MR. NICHOLSON: Your Honor, may the record reflect that this witness has identified this Defendant as the man who held the gun on her?
THE COURT: The record may so reflect.

BY MR. NICHOLSON:

Q Mrs. Chambers, when the man was holding—standing there holding the gun on you, did he say anything to you at that time?
A Yes, sir. He gave me a pastel-striped pillow case and told me to go back there and get my money.
Q Where was Mr. Gray at the time that this man come into the bank?
A He was in the vault getting some papers for the day.

Q Had you just opened up the bank shortly before that time?

A We opened at nine.

Q Mrs. Chambers, when you were looking down the barrel of that gun, and he handed you the pillow case and said, "Get me your money.", were you in fear of your [fol. 17] life or serious bodily injury?

A Yes, sir.

Q You were afraid, then?

A Yes, sir.

Q What did you do after he handed you this pillow slip and told you to get your money?

A I took it and went to the vault.

Q Did you say anything to him or to anyone before you went to the vault?

A No, sir.

Q You started to the vault, then, with the pillow case?

A Yes, sir.

Q Did you—

What did this man do when you started to the vault with that pillow case?

A He walked behind me and stood in front of the door of the vault.

Q Was Mr. Gray in the vault when you went into the vault?

A Yes, sir.

Q Did you say anything to Mr. Gray when you walked into the vault?

A I told him that we were being robbed.

Q Did Mr.—

[fol. 18] What did Mr. Gray say, or what did he do, when you told him, "We are being robbed."?

A Well, he turned to me—and we just both went to the safe. It was right at the side of where he was getting the papers. And we both just got down to get the money from the safe.

Q Where was Mr. Wade standing when you told Mr. Gray that you were being robbed?

A In front of the vault door.

Q Was he visible to yourself and Mr. Gray?

A Yes, sir.

Q Did he still have the gun trained on you and at that time Mr. Gray also?

A Yes, sir.

Q I believe you testified that you and Mr. Gray both started dumping money into this sack?

A That's correct.

Q That he had.

After you—

Did you take all the money that you had there?

A Yes, sir.

Q And put it in the sack?

A Yes, sir.

Q After the sack was filled what happened then?

A Well, we both started from the vault—and he told [fol. 19] me to stay in the vault.

Q You are talking about "he". Are you talking about Billy Wade here (indicating) told you to stay in the vault?

A Yes, sir.

Q Did he say anything to Mr. Gray?

A He told him he wanted the money from the—up front.

Q Did he ever make any threat or any caution to Mr. Gray?

A Yes, sir; he told him if he'd do what he told him to do no one would get hurt.

Q Well, did Mr. Gray do what he told him?

A I believe he did.

Q You say you started out of the vault and he told you to get back into the vault?

A Yes, sir.

Q Did Mr. Gray go on out of the vault?

A Yes, sir.

Q What did this man with the gun do when Mr. Gray stepped out of the vault?

A He held the gun on him. He just backed to the side and he held the gun on him while he went to the front.

Q Now, you say "while he went to the front"—

[fol. 20] A (interrupting) Mr. Gray went to the front.

Q Who—

A (interrupting) Mr. Gray went to the teller's cage to get—up in the front—to get the money.

Q Well, Mr. Gray—what did he—

Well, did he dump any money into the sack from the teller's cage?

A Yes, sir; from the teller's drawer.

Q Did he take money from any other places located in the bank?

A Yes, sir; out of the drawer.

Q Did he—

MR. NICHOLSON: Excuse me.

A (continuing) We had some money on top—and then we had some in the drawer—and he took it from both places.

Q Did this man take all the currency, or did he take any silver?

A No, sir; currency.

Q Solely currency?

A Uh-huh.

Q After the money had been put into the sack, or the pillow slip, all that you had, I presume—what if anything did this man tell—

Did this man—

[fol. 21] MR. HOLCOMB: (interrupting) Your Honor, I'm going to object to Counsel's statement there.

THE COURT: Yes; your statement "all you had, I presume" was highly improper—and it is being stricken from the record and will not be considered by the jury for any purpose.

Now, just ask the questions and don't make observations.

MR. NICHOLSON: Yes, Your Honor.

BY MR. NICHOLSON:

Q After this man had left the bank did you have any currency left in the bank?

A No sir.

Q Mr. Chambers, after the money that was put into the sack was put into it, did this man make any statement to either you or to Mr. Gray, or to both of you?

A He told Mr. Gray to go back into the vault and shut the door.

Q Where were you when he told Mr. Gray that?

A I was in the vault. He had told me again to stay in the vault.

Q Did Mr. Gray come back into the vault?

A Yes, sir.

Q Did Mr. Gray close the door behind him like this [fol. 22] man told him?

A Yes, sir.

Q Did you ever at any time during the course of this entire transaction—did you ever see this man touch anything in that bank?

A Yes, sir; he opened four drawers behind our tellers' cages.

Q Are these pull-type drawers?

A Yes, sir.

Q That you pull out?

A Yes, sir.

Q After—

Where was this man standing when the door to the vault was closed?

A To our right.

Q Did you ever see this man again that morning?

A No, sir.

Q How long did you and Mr. Gray stay in the vault?

A Well, a minute—or somewhere thereabouts.

Q What prompted you to come out of the vault?

A When the door opened and closes, well, we—you can hear pressure. And we heard that pressure go off.

Q When you speak of the door opening and closing [fol. 23] are you making reference to the door of the vault or the front door to the bank?

A The front door.

Q Did you at any time see an automobile parked in front of the bank?

A No, sir.

Q You don't know, then, what this man did after he told you to close the vault door?

A No, sir.

Q After the robbery had occurred did you go out onto the street?

A Yes, sir.

Q Approximately how long was it afterwards that you had gone out onto the street?

A Well, maybe three or four minutes.

Q Did you see anyone there that you knew?

A Yes.

Q Who did you see?

A Mrs. Balfa Ballard.

Q Did you have any conversation with Mrs. Ballard?

A Yes. I—

MR. NICHOLSON: (interrupting)—Don't go into what she said, now.

Q But, you did have a conversation with her. Is that [fol. 24] correct?

A Yes.

Q Was this—

Where was Mr. Gray when you went out onto the street?

A At the phone.

Q Well, what did he do at the phone?

A He called the Sheriff.

MR. HOLCOMB: Now, Your Honor, we are going to object to what somebody else did with regard to this in the absence of the Defendant.

THE COURT: Overrule your objection.

She can't testify as to what was said when he called the Sheriff.

BY MR. NICHOLSON:

Q Did you see Mr. Gray pick up the telephone and call?

A Yes.

Q And who was he calling?

A The Sheriff's Department.

Q All right.

Subsequent to the call that he made to the Sheriff's Department did any officers come to your bank?

A Yes.

Q Who arrived there first, ma'am?

[fol. 25] A J. W. Brownlow (phonetic).

Q Who is he?

A The Sheriff of Henderson County.

Q Did other officers arrive, then, after he came?

A Yes.

Q Did members of the F.B.I. come to the bank at that time?

A Yes.

Q Mrs. Chambers, where is Eustace, Texas, located—in what county?

A Henderson.

Q How much money was taken from the bank at the time of this robbery?

A Fourteen thousand, eight hundred and seventy dollars.

Q Was an audit run to determine how much had been taken?

A Yes, sir.

Q Who ran that audit?

A Mr. Gray.

Q Did you have anything to do with the audit?

A Yes, sir; I rechecked it.

Q Were his figures correct?

A Yes.

[fol. 26] Q The money that was taken in this robbery, Mrs. Chambers—was this bank money? By that, I mean were these funds that were in the custody and control of the bank—in you-all's possession?

A Yes, sir.

Q Mrs. Chambers, when Wade here was in your bank did you notice him do anything that would indicate to you that he was nervous or excited?

MR. HOLCOMB: Your Honor, we are going to object to that. We have no objection to her testifying as to what he did.

THE COURT: Yes; she can testify as to what he did or what she saw.

MR. NICHOLSON: Your Honor, that was the purpose of my question.

THE COURT: I know, buy you are reaching the conclusion yourself. Let her testify as to how he acted.

BY MR. NICHOLSON:

Q Did he—Did he make any gesture or any movement that would—that would indicate to you whether or not he was nervous or calm?

THE COURT: That's exactly what I sustained the objection to. Just let her testify without your trying to [fol. 27] say what your conclusions are—but just let her testify what his actions were. Just let her testify as to how—what his actions were.

BY MR. NICHOLSON:

Q Can you answer this question, then? What was his demeanor or actions in that bank?

A Well he appared to be calm until he came—He appared to be calm when he came in. And along about the latter part, he was nervous.

MR. NICHOLSON: We have nothing further from this witness, Judge.

MR. HOLCOMB: Just a minute, Your Honor.

(pause)

CROSS-EXAMINATION

BY MR. HOLCOMB:

Q Mrs. Chambers, had you ever seen the man who robbed you on the 21st of September, 1964, before the date of the robbery that you know of?

A No, sir.

Q When was the next time that you saw anyone who was supposed to be the man who robbed you, ma'am?—about what date?

(pause)

[fol. 28] A I don't remember the day we came.

Q Wasn't it about May the 10th, 1965—of this year—ma'am?

A I just don't remember.

Q Was it during 1965?

(pause)

A Yes.

Q Prior to the time that you saw this man that was supposed to have been the person who robbed you, Mrs. Chambers, had you been shown any pictures by any officers or any officials—pictures purporting to be the man who robbed you over there at Eustace, ma'am?

A No.

Q During the investigation of the bank robbery no pictures or mug shots—

A (interrupting) Yes, sir.

Q (continuing) —were shown to you?

A Yes, sir.

Q All right.

And by whom were they shown to you, if you recall?

A Well, various law officers.

Q All right; were any of those officers F.B.I. agents?

A Yes, sir.

[fol. 29] Q All right; approximately how many pictures were shown to you?

A Well, quite a few.

Q All right.

During this period of time, Mrs. Chambers, when these pictures were shown to you, there were several pictures which you informed the officers that could be, but you werent' sure. Isn't that correct?—that they looked like the man?

A No, sir.

Q You did not tell any officer that any of the pictures shown to you—

A (interrupting) One.

Q (continuing) —could be the man who robbed you —until you saw Mr. Wade here under the custody of officers—of Officer Albert—at the Smith County Jail. Is that correct?

A No, sir.

We—I picked his picture from the file.

Q All right.

You say "out of the file". How many pictures were shown to you?

A About eight or nine that day.

Q All right; that day.

Where were those pictures taken, ma'am? Do you

[fol. 30] know?

A Yes, sir; the first one that we saw was one—well, let's see. There was one that—

I don't know where that one was taken.

Q All right.

A And the other one was the one that was photographed in the Dallas County Jail.

Q All right; Dallas County Jail?

A Uh-huh.

Q All right.

A It had that writing on it.

Q It had the writing on it. It said "Billy Joe Wade". Is that correct?

A Well, I just remember that it had "Dallas County" on it.

Q All right.

And was there any writing on the back of this picture?

A We didn't see that.

Q You didn't see that?

A No.

Q The officers didn't let you see that?

A No, sir.

Q They didn't tell you his name was Billy Joe Wade or anything like that?

[fol. 31] A No, sir.

Q Did they tell you—

A (interrupting) Not at that time.

Q They didn't tell you who it was or anything like that. Is that correct?

A That's right.

Q All right.

Do you recall the other pictures that were shown to you on that date?

A I don't understand your question.

Q Do you recall the identity of any of the other persons who were shown to you—whose pictures were shown to you on that date?

A No, sir.

Q Were you shown a picture of Norman Thomas Briggs?

A No, sir.

Q Were you shown a picture of a man by the name of Pickett?

A No, sir.

Q Mrs. Chambers, you cannot give us the approimate date of the time that Officer Albert requested—or brought you and Mr. Gray over to the Smith County Jail—this year?

A The time?

[fol. 32] Q The date and the time; yes, ma'am.

(pause)

A Well, it was in the afternoon.

Q All right.

And if the record reflects that it was about May the 10th, 1965, then that would be the first time that you had seen the person whom you say robbed you over at Eustace on September the 21st, 1964. Is that correct?

A Except when he was in the bank.

Q That's what I mean; since the robbery.

A Yes.

Q Since the robbery.

I believe you stated that you had never seen the person who robbed you except on that date—

A (interrupting) Yes.

Q (continuing). —prior to that time.

All right.

Now, I direct your attention to what transpired over at the Smith County Courthouse and Jail.

Is it correct that you and Mr. Gray were taken to the courtroom and sat out on the benches? Is that correct?

A Yes.

Q And that shortly thereafter the F.B.I.—or—F.B.I.

[fol. 33] Agent Albert—brought this Defendant (indicating)—Billy Joe Wade—in his custody—to the anteroom there in the back. Isn't that correct?

(pause)

REPORTER'S NOTE: There was no audible response from the witness.

Q (continuing) The door was open, and you and Mr. Gray were sitting on either the first or second row of benches. Isn't that correct?

(pause)

A Yes.

Q All right.

And this was the only prisoner that—that Mr. Albert, the F.B.I. agent, had.

And shortly thereafter—approximately fifteen minutes later—a deputy sheriff, or another officer, brought three or four other prisoners down. Isn't that correct?

A No, sir; there was more than that.

Q More than that.

All right; five or six?

A Yes.

Q All right.

And the Deputy Sheriff brought down five or six, and Mr. Albert had brought down this Federal prisoner. [fol. 34] Isn't that correct?

A Well, I don't know about that.

Q All right.

But, you saw Mr. Albert with this man; and then at a later time the Deputy Sheriff and the other officer brought down several other prisoners. Isn't that correct?

A Well, I don't know. He was—They were both in the hall.

Q All right; Mr. Albert and Billy Joe Wade were. Correct?

A No; Mr. Albert was in a room.

Q With whom?

A There wasn't anyone in there. This—This boy was standing in the hall.

Q All right; by himself?

A Yes.

Q No custody; no guard?

A I don't know.

Q No officers around at all?

A We don't know—I don't know.

Q You don't know.

You didn't see anyone else?

A No.

Q And was Mr. Albert where he could see this [fol. 35] man?

A Yes.

Q All right.

And he was the only other person there at that time. Is that correct? —Mr. Albert, and this prisoner, and then you folks that walked in the hall?

A No; we were sitting in the doorway. It was opened —and we looked up.

MR. HOLCOMB: Thank you, ma'am.

One moment, Your Honor.

(pause)

Q All right; thereafter some other prisoners were brought in and what they call a "line-up" was had. Is that correct?

A Yes, sir.

Q All right.

And at that time the man who you say is Mr. Wade here (indicating), who had been standing out in the hall, was placed in this line-up with this other group of people—and Mr. Albert asked them some questions, to step forward, and so forth—and you identified this man here (indicating). Is that correct?

A Yes.

Q And—

All right; and then shortly thereafter—Did Mr. Albert [fol. 36] take any pictures at that time?

A Yes.

Q All right.

Then, shortly thereafter, during this—here on this same occasion, Mr. Albert placed some tape or caused to have some tape placed upon the face of Mr. Wade. Is that correct?

A No; they had tape on them when they came in.

Q Whenever you saw Mr. Wade out in the hall, he had no tape on; did he?

A I don't recall.

Q You don't recall?

A No, sir.

Q But you saw him out there in the hall when he—and he was the man that—

A (interrupting) Just a glance was all.

Q All right.

And each one of the men in the line-up had tape on their face. Is that correct?

A Yes; the best I recall.

Q Ma'am?

A Yes.

Q And at that time, that was the first time that you had seen the man that you say robbed you—which you say was Mr. Wade here (indicating)—since September [fol. 37] the 21st, 1964. Is that correct?

A Yes, sir.

Q Was I present at that line-up, ma'am?

A No.

Q Was any lawyer representing Mr. Wade present there as far as you know?

A No.

MR. HOLCOMB: All right; no further questions. Thank you, Mrs. Chambers.

THE COURT: Is that all from Mrs. Chambers?

MR. NICHOLSON: I believe that's all, Judge.

THE COURT: You may step down.

MR. NICHOLSON: Thank you, Mrs. Chambers. Judge, that bank is closed up—and if she can go back they can open it this afternoon for this afternoon's business.

THE COURT: Any objection?

MR. HOLCOMB: Judge, I have no objection.

THE COURT: All right, you can go back to Eustace and disburse the funds, then.

All right; call your next witness.

MR. NICHOLSON: Judge, the Government would call Mr. Lee Gray.

THE COURT: All right, call Mr. Lee Gray.

[fol. 38] LEE GRAY

having first been duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth, did testify as follows:

DIRECT EXAMINATION

BY MR. NICHOLSON:

Q Will you state your name for the Judge and the Jury; please, sir?
A Lee Gray.
Q Mr. Gray, how old a man are you?
A Sixty-four.
Q Where do you live?
A My home is in Mabank, Texas.
Q Do you work anywhere?
A I work in the First State Bank in Eustace.
Q How long have you been employed by the First State Bank over at Eustace, Mr. Gray?
A Twenty-one years.
Q Were you employed as the—
What—What position do you hold over there at the bank?
[fol. 39] A Vice-President.
Q Do you actually run the bank, sir?
A I guess you would say that; yes.
Q Does Mrs. Chambers work with you?
A Yes, sir.
Q What position does she hold?
A Cashier.
Q Anybody else work in that bank besides you two?
A No; not—Just us two—all the time.
Q Mr. Gray, where is your bank located? Is it in Smith County or is it—What county is it in?
A Henderson County.
Q Henderson County.
Is your bank chartered by the State of Texas and does it operate under the banking laws of the State of Texas?
A It does.
MR. HOLCOMB: Judge, to save time, we will stipulate that it's a chartered and regularly operated bank in Texas.
THE COURT: All right.
MR. NICHOLSON: We might ask Counsel one thing here. Will you stipulate—
MR. HOLCOMB: (interrupting) We will stipulate

[fol. 40] as to the F.D.I.C. too. If the man says it's F.D.I.C., we'll—

BY MR. NICHOLSON:

Q (interrupting) Mr. Gray, are the funds of your bank insured by the—any agency of the Federal Government?

A Federal Deposit Insurance Corporation.

MR. HOLCOMB: We'll stipulate to those two items, then, Your Honor, to save time.

THE COURT: All right; the funds of the bank, then, were so insured by the Federal Deposit Insurance Corporation as of September the 16th, 1964—or as of September the 21st, 1964.

MR. NICHOLSON: Thank you.

THE COURT: Is it so stipulated?

MR. HOLCOMB: Yes, Your Honor.

THE COURT: All right.

BY MR. NICHOLSON:

Q Mr. Gray, directing your attention back to the date of September the 21st of 1964, Monday morning: I will ask you if anything unusual occurred at the bank.

A Well, there was a gentlemen stepped into the bank and relieved us of what cash we had on hand.

Q Mr. Gray, where were you when you first saw the [fol. 41] man that relieved you of your cash?

A I was inside the vault.

Q When did—

Where was this man standing, or where was he located, when you first saw him?

A Well, when I first saw him, he was about, oh, I imagine ten feet away from the vault door—out in the building.

Q Where was Mrs. Chambers when you first saw this man—excuse me—when you first saw a man?

A Where was Mrs. Chambers?

Q Yes, sir.

A Well, she had come into the vault.

Q Did Mrs. Chambers make any statement to you when she came into the vault?

A She said, "Mr. Gray, we are being robbed."

Q What did you do when she told you you were being robbed?

A I beg your pardon; I didn't—

Q What did you do when she told you that you-all were being robbed?

A Well, she gave me this pillow case that she had in her hand and said, "He told us he wanted us to put the money in there."—in that bag.

Q When you looked up, and saw the man about ten [fol. 42] feet from you in the bank there was he holding anything or carrying anything?

A Yes; he had a gun.

Q What kind of gun did he have, Mr. Gray?

A A pistol.

Q Did you get a good look at that gun?

A Only looking right straight at the barrel.

Q Do you recall whether it was a pistol, a revolver—blue, silver, or what type of gun it was?

A It was nickel-plated.

Q I will show you what has been marked and introduced into evidence as Government's Exhibit No. 1—

REPORTER'S NOTE: An object was then displayed before the witness.

Q (continuing) —and ask you if that looks like—does that look like the gun?

A It does.

Q I believed you testified that Mrs. Chambers had a sack in her hand, or a—when she came into the vault. Is that correct, sir?

A That's right.

Q What did you and Mrs. Chambers do with that sack?

A We put what money was in the safe inside it.

[fol. 43] Q And you had put the money in the safe in the—After you had put the money in the safe in the sack, what then occurred?

A Well, I walked out into the other part of the building—out of the vault.

Q Yes.

Did—Did Mrs. Chambers follow you out of the vault?

A Well, sir; I think she started—and he—he told her to not come out.

Q What did he do when you walked out of the vault door?

A He just made the remarks—he said, "Mr. Gray, do what I tell you and you won't get hurt."

Q Well, did you do what he told you?

A I did.

Q What did he tell you to do then?

A Then he told me to come to the drawers where we had the other money—and on the shelves—and he said, "Put the rest of it in here too."

Q Did you put the rest of the money in there?

A I did.

Q Did you put all of the currency—

Excuse me, did you put currency and silver into the sack?

[fol. 44] A No, sir; no silver. It was just currency.

Q Did you put all the currency that you had in the bank in there?

A All we had. All we had.

Q Mr. Gray, how close was this man to you with that gun?

A It was just about to this gentleman sitting right there (indicating).

Q Did the man have the gun trained on you?

A He did.

Q When you were looking down the barrel of that gun were you in fear of your life or serious bodily injury if you didn't do what he told you?

A I was; yes.

Q Mr. Gray, do you see the man in this courtroom that held the gun on you?

A Yes.

Q Will you point him out for the jury?

A Sitting behind the attorney over there.

Q You are making reference to the man in the blue or black suit here (indicating)—behind Counsel?

A That's right.

Q Mr. Gray, is there anything different about this man today than it was when you were looking at him in the bank, that day?

[fol. 45] A Well, he's dressed differently—and he don't have those patches on his cheeks—tape.

Q Can you describe for the jury the patches or tapes on his cheeks that he had on the day that he was in your bank?

A Well, on either cheek (indicating) was a small piece of tape—right across in this direction (indicating) —from one side to the other.

Q All right, sir.

After you had put all of your cash into the sack did this man tell you to do anything?

A He told me to go inside the vault and close the door.

Q Did you do that?

A Yes; I did.

Q Where was this man standing—

Where was he the last time you saw him?

A Well, when I started into the vault, I had my back to him. He was still out in the building, between the vault and the counter—and when I went in, my back to him. I pulled the door to behind me; and that is the last I saw him.

Q Did—Did you run an audit yourself to determine how much money had been taken in this robbery?

A Yes; I did.

[fol. 46] Q How much money was taken, Mr. Gray?

A Fourteen thousand, eight hundred and seventy dollars.

Q You yourself ran that audit?

A I did.

Q And you—

Have you seen this man since the time that he was in your bank?

A Well, we were called down here one time. I don't remember exactly the date, to a line-up.

Q How many men were in that line-up, Mr. Gray?

(pause)

REPORTER'S NOTE: There was no audible response.

Q (continuing) Was there—
A (interrupting) I believe there were five.
Q Did you see this man in the line-up?
A I did.
Q Did all the men in the line-up have tape on their faces?
A Yes.
Q Were they all dressed alike other than tape on their faces?
A No; I don't think so.
Q When this man was in your bank did he have any [fol. 47] type cover on his head?
A He had a broad-brim straw hat.
Q Do you recall what kind of clothes he had on?
A Well, I think he had on grey khaki trousers and a long-sleeve sport shirt.
Q When the officers came to your bank on the day it was robbed, and the days thereafter, did they exhibit to you some pictures of people?
A I don't know whether they did that day or not. They did from time to time.
Q Can you give the jury the best estimate that you could make as to how many pictures you looked at?
A Oh, no; I—I couldn't make an estimate of how many we looked at. Several of them.
MR. NICHOLSON: We have nothing further of this witness, Judge.

CROSS-EXAMINATION

BY MR. HOLCOMB:

Q Mr. Gray, as far as you know had you ever seen the man that robbed the bank over there prior to September the 21st, 1964?
A Not that I know of; no.
[fol. 48] Q All right, sir.
And if I may ask, sir, when was the next time that you saw anyone who was either informed to you to be the man who robbed you or intimated to be the man who

robbed you, or was identified by you as the man who robbed you? When was—When was the next time that you saw such a person?

A When we came down here.

Q All right, sir.

A For the—

Q (interrupting) Could you give us your best judgment of about when it was you came to—

Was it here in Tyler, Texas, you came to?

A It was in Tyler; yes.

Q All right, can you give us in your best judgment about what day of this year it was that you were asked to come over?

A No; I wouldn't attempt to say exactly what day it was.

Q All right, sir.

If the record shows it was about May the 10th, 1965, was that the only time that you came over to such a line-up as you mentioned?

A Just only the one time; that's all.

Q One time?

[fol. 49] A That's all.

Q All right, sir.

Now, did this happen over here in the Smith County Courthouse—this line-up, Mr. Gray?

A Yes, sir.

Q Now, Mr. Gray, whenever you went to the courthouse—

You know where the courtrooms are over there; do you not?

A Well, that's the first time I'd—I was ever in there.

Q All right, sir.

Now, before you went into the courtroom, did you see anyone in the custody of Mr.—

Do you know Mr. Kenneth Albert of the F.B.I.?

A Yes.

Q Is that the gentleman sitting across here (indicating)?

A That's him.

Q Prior to the time you went into the courtroom on that date did you see Mr. Albert with this man in his custody—out in the hall?

A Out in the hall?
Q Yes.
A Well, I don't know whether I saw him personally—
[fol. 50] but I saw someone out in the hall with Mr. Albert.
Q You saw—
A (interrupting) I don't know whether—
Q (interrupting) Pardon me.
You saw Mr. Albert and one prisoner. Is that correct?
A Well, that's what I said; I don't—I don't—I couldn't recall whether I saw anyone else—
Q (interrupting) All right.
A (continuing)—with him or not.
Q All right.
But, you did see someone in the hall besides Mr. Albert. Is that correct?
A Yes, sir; that's right.
Q All right, sir.
And at that time was there anyone else around the courtroom or anything for this line-up, and so forth, except this person who was with Mr. Albert—and yourself and Mrs. Gray—or yourself and Mrs. Chambers?
A Now, I didn't get that question exactly.
Q About the time of this line-up, or just before the line-up, out here in the hall—
A (interrupting) Uh-huh.
Q (continuing)—whenever you saw Mr. Albert—
[fol. 51] Did you shake hands with him?
A No; not at—
Q (interrupting) Did he speak to you?

(pause)

A Well, I think we had seen him before—before he—they—the others came in.
Q All right, sir.
And this man was with Mr. Albert before the others came in with some other officers?
A I mean, I—we spoke to Mr. Albert before the rest of the men that they had in the line-up came in.
Q All right, sir.

And the only one there with Mr. Albert—he just had one prisoner at that time before the others came down. Isn't that correct, sir?

A No; not at the time I spoke to Mr. Albert.

Q At the time you spoke to Mr. Albert where was it?

A Well, I don't—I don't—I can't say exactly.

Q Let's get back to the hallway, Mr. Gray, and let me get straightened out here.

I believe you told us that you saw Mr. Albert and someone with Mr. Albert, whom you didn't identify or don't recall who it was with Mr. Albert, in the hall as you and [fol. 52] Mrs. Chambers came on in to go to the courtroom. Is that correct?

A No; we saw him—while we were in the courtroom they opened the door, and we saw them from there.

Q All right, sir.

In other words, you had already got into the courtroom and were sitting on the first or second row there, and the door was opened and you saw Mr. Albert and someone in the room with him?

A In the hall.

Q All right; in the hall with him?

A Yes; that's correct.

Q All right, sir.

And you—do you recall how this person with him was dressed?

A No.

Q All right; do you recall anything about what he looked like or anything like that?

(pause)

A Well, we—he resembled the person that we identified as the one that had entered the bank.

Q All right, sir.

And then shortly thereafter some other officers who you may or may not know—I don't know, Mr. Gray—brought some other prisoners or some other people down there—[fol. 53] and that's when you had the line-up. Is that correct, sir?

A That's right.

Q But my point is this, Mr. Gray: before these other folks were brought down there, or came down there, Mr. Albert and the person with him, which you said resembled the Defendant and resembled the man who robbed the bank over there, were the only two people that you could look through from out there and see. Isn't that correct, sir?

A That's right.

Q And you certainly knew that Mr. Albert wasn't a suspect; didn't you?

A Yes.

Q Thereafter, Mr. Gray, in the line-up, you identified this same man who was there in the hallway with Mr. Albert as being the man who robbed the bank. Is that correct?

A Yes.

Q And that was the first time that you had seen this individual, or the person that you identified as the one robbing the bank, since September the 21st, 1964. Is that correct, sir?

A That's correct.

Q Mr. Gray, was I present at the time of this line-up over there?

[fol. 54] A I don't know whether you were or not.

Q All right; do you think you would recognize me if you had seen me before?

A Well, I think I would now—after seeing you.

Q All right, sir.

A But—

Q (interrupting) All right, sir; was anyone over there acting as a lawyer or anything like that for Mr. Wade?

A No.

Q All right, sir.

Am I correct in stating that, sir, the only folks present where you, and Mrs. Chambers of the bank, Mr. Albert, another officer or two, and these people who stood in the line-up?

A That's correct.

MR. HOLCOMB: Thank you very much, Mr. Gray.

REDIRECT EXAMINATION

BY MR. NICHOLSON:

Q Mr. Gray, Counsel here has asked you if you thought you could remember him. If he had held a gun on you and robbed you, do you think you would be able to re-
[fol. 55] member his face some time later?

A I think so; yes.

Q Is there any doubt in your mind but what this man here (indicating) is the one that robbed you?

A No.

MR. NICHOLSON: No further questions.

MR. HOLCOMB: Nothing further.

THE COURT: All right, step down, Mr. Gray.

Do you want Mr. Gray finally excused so he can go open up the bank?

MR. NICHOLSON: Yes.

MR. HOLCOMB: We have no objection, Your Honor.

THE COURT: All right, Mr. Gray, you can go. You are finally excused.

MR. HOLCOMB: Thank you, sir.

THE WITNESS: Thank you.

THE COURT: All right, who will the Government have next?

MR. NICHOLSON: May I have just a minute, Judge?

(pause)

Your Honor, Ladies and Gentlemen of the Jury, at this time the Government rests its case-in-chief.

[fol. 56] THE COURT: All right, what says the Defendant?

MR. HOLCOMB: We would like to call Officer Albert to the stand; please, sir.

THE COURT: All right; come around, Mr. Albert.

Were you sworn yesterday?

MR. ALBERT: Yes.

THE COURT: In this case?

CLERK OF THE COURT: Yes.

KENNETH ALBERT,

having first been duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth, did testify as follows:

DIRECT EXAMINATION

BY MR. HOLCOMB:

Q You are Kenneth Albert, Acting Special Agent of the F.B.I., stationed here in Tyler. Is that correct, sir?

A Yes, sir.

Q Mr. Albert, do your records reflect the date of the [fol. 57] line-up which was just discussed and testified to by Mr. Gray?

A Yes, sir.

Q What was that date, sir?

A May the 12th, 1965.

Q All right, sir.

Was I, Weldon Holcomb, the attorney appointed by the Court, notified of such action by the F.B.I. prior to the line-up?

A No, sir; you had not been appointed at that time.

MR. HOLCOMB: Would you please mark this for identification as Defendant's Exhibit No. 1.

(*LETTER*—(a copy)—dated April 26, 1965, addressed to Honorable Weldon G. Holcomb, signed by Joe W. Sheehy, United States District Court, Eastern District of Texas, was duly marked as:

DEFENDANT'S EXHIBIT NO. 1)

Q Officer Albert, I hand you here what has been marked for identification as Defendant's Exhibit No. 1—and would you tell us what it is, sir?

REPORTER'S NOTE: An instrument was then handed to the witness.

[fol. 58] (pause)

A It's a Court order appointing you to represent Billy Joe Wade.

Q In what cause number, sir?
A 6805.
Q And that is the cause on trial at this time?
A Yes, sir.
Q What is the date of that letter, sir?
A April 26, 1965.
Q April 26, 1965?
A Yes.
Q And by whom is it signed?
A Judge Sheehy.
Q And does it reflect on the fact of it to whom copies of that letter were sent?
A Yes, sir.
Q Who are they, sir?
A Mr. Nicholson and Mr. Reynolds. Mr. Nicholson, the Assistant United States Attorney, and Mr. Reynolds is United States Marshal. Also to James R. Cooney, District Clerk, and to Billy Joe Wade.

MR. HOLCOMB: We offer this in evidence, Your Honor.

MR. NICHOLSON: Judge, we don't have any objec-
[fol. 59] tion to it. It's apparently a copy signed by the Court.

MR. HOLCOMB: It's the original, Your Honor.

THE COURT: All right.

REPORTER'S NOTE: An instrument was then handed to the jury.

MR. HOLCOMB: No further questions.

* * * *

[fol. 60]

MOTION FOR JUDGMENT OF ACQUITTAL AND DENIAL THEREOF

MR. HOLCOMB: Your Honor, if it is appropriate at this time, we would like to make a motion for judgment of dismissal on the ground—

THE COURT: (interrupting) Judgment of acquittal.

MR. HOLCOMB: Judgment of acquittal—on the grounds that the identification testimony of the witnesses, Gray and Chambers, in regard to the identification of the

Defendant, Billy Joe Wade, was obtained in violation of the statutes and the Constitution of the United States, in that the attorney for the Defendant, who had been previously appointed, was not consulted nor present at the time of such action, and that such actions were not subject to nor done with or by the consent or advice of counsel appointed by the Court, and were in deprivation of his rights to due process and self-incrimination statutes and constitutional provisions; and move to strike the testimony of Mr. Albert and—not Mr. Albert—but to strike the testimony of Mr. Gray and Mrs. Chambers in regard to such identification.

MR. NICHOLSON: May it—

Your Honor, I might point out that the Government [fol. 61] did not even go into the line-up whatsoever on the direct examination of Mrs. Chambers; that that testimony was elicited by Counsel for the Defendant himself after the subject matter had been opened up for the jury before the subject was pursued by the witness, Mr. Gray.

THE COURT: Yes.

I am going to overrule the motion for judgment of acquittal and the motion to strike the testimony of the witnesses Gray and Chambers.

I will say this, though, that under the recent holding of the Court of Appeals for the Fifth Circuit, in the Clinton case, had the F.B.I. taken a statement from this witness—this man—at that time, after his attorney had been appointed without notifying his attorney, it would not be admissible in evidence.

* * * *

[fol. 62]

EXCERPTS FROM MR. HOLCOMB'S ARGUMENT TO THE JURY

But, for a period of seven months—or eight months—from September the 21st until May the 12th—Mrs. Chambers and Mr. Gray say they saw no one—identified no one in regard to the matter, and that on May the 12th they were called to Tyler for a line-up. Mrs. Gray—Mrs. Chambers was shown a picture; and then she says that she sees a man in the hall with Mr. Albert—not a group of prisoners, now, mind you—not a regular line-up—but

[fol. 63] there is the only prisoner—the only man with this Federal officer.

And, according to the testimony, at a later time several other people were brought down by another officer, or someone else, and then they had a line-up—and that they then put tape on them.

But, they first time they saw him, they were sitting in the courtroom, like these folks here (indicating) apparently, and here standing in the anteroom, or the hall, is Mr. Albert—a professional officer—a special agent of the F.B.I.—with this one prisoner—no hat on.

Mr. Wade didn't have a hat on. He was standing there in the hall with—with this officer.

So, we see, that's the only man with Mr. Albert.

Then Mr. Albert runs the line-up through there. He questions them—lines them up—got tape on their face—and he takes pictures and he questions them.

Is there any possibility—any reasonable possibility that Mr. Gray or Mrs. Chambers could have been honestly, though innocently, influenced by the association of this [fol. 64] Federal officer with that one prisoner—and the State brings out a bunch more?

Is it possible?

Isn't it reasonable?

Yes.

They identified him.

And, I'll say this: they sincerely believe what they said.

THE COURT: You have five minutes left, Mr. Holcomb.

MR. HOLCOMB: Thank you, Your Honor.

But, as we go a little further—

The case will be in your hands as soon as Mr. Nicholson gets up and replies.

But, in regard to this line-up—the line-up of May the 12th—sixteen or seventeen days after the man had been appointed a lawyer, according to the letter here was—that was introduced in evidence here—which shows that Mr. Nicholson was notified—Mr. Reynolds, the Marshal, was notified—Mr. Cooney was notified—and Mr. Wade the Defendant was notified.

So this man . . . . He was under arrest. He was taken to the courthouse under circumstances . . . . Not that it's [fol. 65] illegal. No one says it's illegal for such action to transpire. But, you are entitled to take such action and place it in the proper perspective as to how it was handled—that the man's lawyer was not there.

He knew he had a lawyer. His lawyer was not notified. So, there we are.

* * * *

[fol. 66]

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS—TYLER DIVISION

No. 6805—Indictment—2 Counts

UNITED STATES OF AMERICA

v.

BILLY JOE WADE

JUDGMENT AND COMMITMENT—Aug. 30, 1965

On this 30th day of August, 1965 came the attorney for the government and the defendant appeared in person and [1] by counsel, Weldon G. Holcomb, Tyler, Texas, appointed by the Court.

IT IS ADJUDGED that the defendant has been convicted upon his plea of [2] NOT GUILTY and a Jury Verdict of GUILTY of the offense of conspiracy to rob The First State Bank of Eustace, Texas, in violation of Title 18, U. S. C., Sec. 371, as charged in Count One; and robbery of said Bank by use of a dangerous weapon, in violation of Title 18, U. S. C., Section 2113(d), as charged in Count Two [3] in the INDICTMENT and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

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[1] Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel."

[2] Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be.

[3] Insert "in count(s) number " if required.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4] Five (5) years on Count One; Fourteen (14) years on Count Two; to run concurrently. Said defendant shall become eligible for parole at such time as the Board of Parole may determine.

* * * *

APPROVED

/s/ [Illegible]
A. U. S. A.

FILED
August 30, 1965
James R. Cooney, Clerk, U. S. Court
By /s/ Evelyn Walker
Deputy

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Joe W. Sheehy
United States District Judge.

The Court recommends commitment to:[6]

.....
Clerk.

---

[4] Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law.

[5] Enter any order with respect to suspension and probation.

[6] For use of Court wishing to recommend a particular institution.

[fol. 67]

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 22976

BILLY JOE WADE, APPELLANT

versus

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the Eastern District of Texas.

OPINION—March 31, 1966

Before TUTTLE, Chief Judge, JONES and WATERMAN,* Circuit Judges.

TUTTLE, Chief Judge: Billy Joe Wade was arrested in Houston, Texas, on the 2nd day of April, 1965. He had been indicted by a federal grand jury for the Eastern District of Texas, which charged that, along with Briggs and Pickett, he had conspired with them to rob, and had robbed, a federally insured bank at Eustace, Texas. It is apparent that the indictment was based entirely upon the testimony given by the alleged accomp-
[fol. 68] lices, who had been arrested and sentenced on another offense some time earlier.

The trial court appointed counsel on April 26, 1965, at which time Wade was in custody in the Smith County Texas Jail. Thereafter, without notice to counsel, on May 12th, the appellant was taken from his cell to the second floor of the courthouse. At that time, the president and cashier of the bank, the only persons who were present at the time of the robbery, were in the courtroom, where a lineup was to take place. They observed Wade in the hall outside the courtroom in the custody of an officer, and thereafter, following the assembly of five other persons, Wade was put in the lineup of six people. Each of the six

* Of the Second Circuit, sitting by designation.

men in the lineup had had some bandages affixed to his face in a manner which the witnesses had stated had been worn as a disguise by the person who had robbed the bank. The lineup was conducted by Special Agent Albert of the Federal Bureau of Investigation. The record discloses that while they were in the lineup, "Mr. Albert asked them some questions—to step forward and so forth."

The witnesses, Mr. Gray and Mrs. Chambers, indentified the appellant in the lineup as the individual who robbed the First State Bank of Eustace. Later, at the trial, both Briggs and Pickett testified as to their participation with Wade in the robbery and the identification was repeated by Mrs. Chambers and Mr. Gray. Wade was found guilty by the jury and sentenced by the trial court to serve five years on the first count and fourteen years on the second count, the sentences to run concurrently. [fol. 69] Although the record does not show exactly what oral statements were required to be made by Wade during the lineup, government counsel, in oral argument, commendably conceded that each of the persons in the lineup was required to repeat words something like, "Put the money in this bag," in order that the witnesses could hear similar words to compare with their recollection of the sound of the voice of the person who gave them such instructions at the time of the robbery.[1]

Appellant's attack on his conviction and sentence here is two-fold. He complains, first, that the manner in which he was brought to the attention of the principal non-accomplice witnesses against him for identification purposes, amounted to a requirement that he give evidence against himself in violation of the Fifth Amendment, and that, second, subjecting him to the lineup under the circumstances here stated, in the absence of his counsel, after the accusatory stage of the prosecution had commenced, deprived him of the right to counsel at a critical stage of

[1] We deem it appropriate to consider this fact as a part of the record on appeal because, were it not considered, then it would remain as a possible basis for the filing of a petition for post conviction review at a later date, if it is not disposed of on direct appeal at this time.

the proceedings in violation of the Sixth Amendment to the Constitution. He says that the later identification by the bank officials in open court was necessarily poisoned by their earlier identification of him conducted in the prejudicial manner outlined, and that, thus, it was error to receive the testimony of the two witnesses who identified in open court. Appellant relies on the cases of *Escobedo* v. *Illinois*, 378 U.S. 298; *Massiah* v. *United States*, 377 U.S. 201.

[fol. 70] Appellant concedes that the courts have repeatedly held that an ordinary lineup of an accused person with others for the purpose of having them viewed by victims of the alleged crime for purposes of identification does not run afoul of the self-incrimination provisions of the Fifth Amendment. Although no Supreme Court decision on this precise point has been cited nor found by us, there is the well-known dictum of Mr. Justice Holmes in *Holt* v. *United States*, 218 U.S. 245, where it is said that the prohibition of the Fifth Amendment "is a prohibition of the use of physical or moral compulsion to extort communications from him, not in exclusion of his body as evidence when it may be material."

The Court of Appeals for the Second Circuit, sitting en banc in the case of *United States ex rel Theodore R. Stovall* v. *Denno, Warden*, 2nd Cir. . . . . F.2d . . . ., (No. 307, Sept. Term, 1964, decided Jan 31, 1966), deals with this problem in extenso. We find no reason to express a contrary conclusion so far as relates to the ordinary police lineup which is carried out under conditions which permit the greatest objectivity of viewing the accused with others who are exhibited with him.

When, however, a lineup goes beyond these limits, such as, for instance, requiring him to act out part or all of the crime which it is charged that the perpetrator of the crime performed, we note a very strong caveat. As Judge Friendly of the Second Circuit pointed out in his prior opinion in *Stovall*, when it was first decided by a panel of three judges, (Unpublished opinion, No. 307, Sept. Term, 1964, decided Mar. 31, 1965,) the Holmes [fol. 71] opinion in the *Holt* case which said, "Moreover, we need not consider how far a court would go in com-

pelling a man to exhibit himself. For when he is exhibited, whether voluntarily or by order, and even if the order goes too far, the evidence, if material, is competent, *Adams* v. *New York*, 192 U.S. 585" was written before *Weeks* v. *United States*, 232 U.S. 383, which, for the first time proscribed the use in the Federal courts of illegally obtained evidence. Following *Weeks*, it does become important in a proper case to determine whether an order requiring that a man "exhibit himself" goes too far.

However, we need not resolve this issue in this case because we are persuaded of the correctness of the position taken by the dissenting judges in the *Stovall* case, when it was decided by the court en banc. There, Judges Friendly, Waterman and Smith found that a compulsory confrontation by an accused person charged in a capital case by taking him to the hospital of one of the victims of the violent crime for identification after his arrest, but before counsel had been appointed for him, violated the principles announced by the Supreme Court in *Massiah* v. *United States*, because, as the dissenting opinions of Judges Friendly and Waterman stated, "The State wishes to make use of him to obtain evidence that will have independent testimonial value."

Here, as was true without question in the *Stovall* case, there is no doubt that the criminal prosecution had commenced and that Wade was, at all times thereafter, entitled "to have the assistance of counsel for his defense." *Hamilton* v. *Alabama*, 368 U.S. 52; *White* v. *Maryland*, [fol. 72] 373 U.S. 359. It becomes necessary, therefore, only to determine here whether requiring Wade to submit to a lineup of the character that has been depicted above in the absence of counsel already assigned to him, deprived him of the aid of counsel at a critical stage of the prosecution. At this late date, it cannot be doubted that if Wade had made a confession, instead of being subjected to the lineup and being required to speak certain words formulated by the prosecution, a conviction based on such confession would be void. *Massiah* v. *United States*, 377 U.S. 201. Neither can there be any doubt that if counsel had been notified and had been present, he could have instructed his client, the appellant here,

to remain silent and not make the verbal responses required of him by the prosecutor. Counsel, if present, might also have been able to prevent the placing of the suspect in a place where he could be seen separately by the prospective prosecution witnesses before the lineup took place.

We think it clear that the conduct of the lineup under the circumstances here present, in the absence of counsel, was a violation of Wade's constitutional rights. There remains the question whether such violation was of such a nature as to require a finding that the lack of counsel was prejudicial to Wade.

The test whether error was harmless was last stated by the Supreme Court in *Fahy* v. *Connecticut*, 375 U.S. 85, where the court said, "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." 375 85, 86. In view of the fact that the identification of Wade by Mr. [fol. 73] Gray and Mrs. Chambers at the lineup was six months after the occurrence, and, in view of the fact that Wade was placed, even fleetingly, in a position where he was seen separately by the two prospective witnesses alone, before the lineup, and also because of the compulsory verbal responses made by Wade at the instance of the Special Agent, it cannot be said with any certainty that they would have recognized appellant at the time of trial if this intervening lineup had not occurred. Further, when it is considered that the only other testimony by which Wade was identified with the crime was the testimony of his alleged accomplices, who admitted at trial to inconsistent statements, we would be naive, indeed, were we to hold that "There [was not] a reasonable possibility that the [violations] complained of might have contributed to the conviction." This being the test devised by the Supreme Court as being applicable in its review of a State court conviction, it must be assumed that, in a Federal court conviction, no less strict a standard applies. The dissenting opinion in *Fahy* v. *Connecticut*, notes this distinction. 375 U.S. 85, 92.

It appearing, therefore, that the lineup, held as it was, in the absence of counsel, already chosen to represent appellant, was a violation of his Sixth Amendment rights,

and, it being plain that the error in not striking the testimony of the two witnesses which we find may well have been colored by the illegal procedure was prejudicial under these applicable legal standards, it follows that the judgment of conviction must be reversed and the case remanded for further proceedings. In the event of a new trial, the evidence of the two bank witnesses, following [fol. 74] the occurrence that we have held to have violated Wade's rights, must be omitted.

The judgment is REVERSED and the case is REMANDED to the trial court for further proceedings not inconsistent with this opinion.

JONES, CIRCUIT JUDGE, DISSENTING

The effect of the determination of the majority will probably result in the discharge of two persons convicted of bank robbery. The decision of the majority is made, at least in part, on the basis of facts outside the record. These facts are considered, so it is said, in order to avoid having a post conviction proceeding instituted. I am not persuaded that this is any justification for considering on appeal something which was not in the record and not before the trial court. Post conviction remedies were intended to cover situations where the right to relief was not disclosed by the record. It follows from the opinion of the majority that it is improper for observers of a crime to see a person suspected or accused of the offense prior to trial. I had no notion that this was prohibited.

I do not think it has been previously held that putting a suspect or an accused in a line-up and treating him in the same manner as the others are treated is or may be a violation of a constitutional right.

I would follow the decisions cited by the majority rather than the dissenting views in those cases. Therefore I

DISSENT.

[fol. 75]

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1965

No. 22976

D. C. Docket No. 6805-Criminal Action

BILLY JOE WADE, APPELLANT

versus

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the Eastern District of Texas.

Before TUTTLE, Chief Judge, JONES and WATERMAN,* Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

JONES, Circuit Judge, dissents.

March 31, 1966

*Of the Second Circuit,
sitting by designation.

Issued as Mandate: May 19 1966

[fol. 76]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[File Endorsement Omitted]

[Title Omitted]

Appeal from the United States District Court
for the Eastern District of Texas

ORDER DENYING PETITION FOR REHEARING—
May 11, 1966

Before TUTTLE, Chief Judge, JONES and WATERMAN*, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above styled and numbered cause be, and the same is, hereby DENIED.

*Of the Second Circuit, Sitting by designation.

[fol. 77]

SUPREME COURT OF THE UNITED STATES

No. ——, October Term, 1965

UNITED STATES, PETITIONER

vs.

BILLY JOE WADE

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 11th, 1966

/s/ Hugo L. Black
Associate Justice of the Supreme Court of the United States

Dated this 15th
day of June, 1966

[fol. 78]

SUPREME COURT OF THE UNITED STATES

No. 334, October Term, 1966

UNITED STATES, PETITIONER

v.

BILLY JOE WADE

ORDER ALLOWING CERTIORARI—October 10, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. The case is placed on the summary calendar and set for oral argument immediately following No. 223.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1966 236452 343

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

BILLY JOE WADE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH [redacted] CIRCUIT

The Acting Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit reversing respondent's conviction for conspiring to rob, and for robbing, a federally insured bank.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 11–18) is reported at 358 F. 2d 557.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1966 (App. B, *infra*, p. 19). A petition for rehearing *en banc* was denied on May 11, 1966 (App. C, *infra*, p. 21). By order of Mr. Justice Black, the time within which to file a petition for a writ of certiorari was extended to and including July

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11, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the fact that a lineup (at which participants were asked to utter a specified sentence) was conducted after indictment and without notification to respondent's counsel required exclusion of the courtroom identification of respondent by witnesses who had identified respondent at the lineup.

STATEMENT

Respondent was convicted by a jury in the United States District Court for the Eastern District of Texas under a two-count indictment charging that he conspired to rob, and did rob, a federally insured bank in Eustace, Texas, in violation of 18 U.S.C. 371 and 2113 (a) and (d). He was sentenced to imprisonment for five years on the conspiracy count and for fourteen years on the robbery count, the sentences to run concurrently. The court of appeals reversed, one judge dissenting.

The evidence showed that a bank in Eustace, Texas, was robbed on September 21, 1964. While one man waited outside in a parked automobile, another man, with a small strip of tape on each side of his face, entered the bank, trained a pistol on the two employees, handed them a pillow case, and ordered them to fill it with currency. The two employees complied and the robber then fled with his accomplice in the waiting car.

In February and March, 1965, two men who had pleaded guilty and had been sentenced for the robbery

of a San Antonio bank, but who had previously denied robbing the Eustace bank, gave written statements to F.B.I. agents acknowledging their complicity in the Eustace robbery. They named respondent as a third participant and as the one who had actually entered the bank. An indictment against respondent was returned on March 23, 1965. Respondent was arrested on April 2, 1965, and on April 26 an attorney was appointed to represent him. On May 12, without notice to respondent's appointed counsel, respondent and six other prisoners were taken from their jail cells for the purpose of appearing in a lineup before the two bank employees who had witnessed the robbery. Before the prisoners entered the room in which the lineup was to be held, one of the two bank employees, who was then in the room, observed through an open door that respondent was standing in the hallway (R. 235–240).[1] The other employee, through the same open door, was able to see respondent and also a man whom he knew to be an F.B.I. agent (R. 252–256). The prisoners, including respondent, were then brought into the room. All wore tape on their faces as had the robber of the bank. Each was asked to repeat the phrase, "Put the money in this bag."[2] The two employees identified respondent as the man who had committed the robbery (R. 238, 249).

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[1] "R." refers to the typewritten transcript of the trial proceedings.

[2] The fact that the prisoners were asked to repeat words does not appear in the record. It was disclosed by government counsel on oral argument before the court of appeals, and was considered by a majority of the panel in order to remove the fact "as a possible basis for the filing of a petition for post conviction review at a later date" (App. A, *infra*, p. 13).

At the trial, one of the two accomplices whose confessions had led the F.B.I. to respondent testified that he had helped plan the robbery with respondent and the other accomplice, but that he had decided not to participate in its execution since he was well known in the area. The other accomplice testified that he was the one who had driven the automobile involved and that respondent was the one who entered the bank. The two bank employees then described the robbery and identified respondent as the man who had taken the money at gunpoint (R. 219, 247). On cross-examination of the first employee to testify, defense counsel elicited, for the first time, the fact that the witness had identified respondent at a lineup, and that prior to the lineup she had seen respondent through an open door (R. 235–240). Defense counsel also elicited the fact that, at some time between the robbery and the lineup, the witness had picked respondent's picture out of a series of photographs and identified it as depicting the robber (R. 231–232). Thereafter, on direct examination of the second employee, the lineup identification was again brought out (R. 249). Cross-examination of the second employee was concentrated on his pre-lineup observation of respondent and the agent through the open door (R. 252–256). Re-direct examination established that the employee had no doubt in his mind that respondent was the robber (R. 258). After the close of all the evidence, defense counsel moved for a judgment of acquittal on the ground that the conduct of the lineup without notice to respondent's attorney was in violation of respondent's constitutional rights. Alternatively he moved

to strike the identifying testimony of the two bank employees (R. 266). The motions were denied.

On appeal, the court of appeals, one judge dissenting, reversed the conviction on the ground that the post-indictment lineup in the absence of respondent's appointed counsel violated respondent's Sixth Amendment rights. The majority expressly adopted the view of the dissenting judges in *United States ex rel. Stovall* v. *Denno*, 355 F. 2d 731 (C.A. 2, *en banc*), that a defendant is entitled to the assistance of counsel when the government "wishes to make use of him to obtain evidence that will have independent testimonial value" (App. A, *infra*, p. 15).[3] The majority also postulated that, had counsel been present in this case, he might have instructed respondent not to make the verbal responses requested for voice identification, and also might have prevented the situation whereby the bank employees saw respondent before the lineup took place. In the circumstances, the majority found the "illegal procedure" might well have prejudicially colored the bank employees' courtroom identification. The majority concluded that reversal was required, and that in the event of a new trial "the evidence of the two bank witnesses, following the occurrence that

[3] The *Stovall* decision stated that placing a defendant in a lineup for identification did not violate his Fifth Amendment rights, and the majority here found "no reason to express a contrary conclusion so far as relates to the ordinary police lineup" carried out fairly (App. A, *infra*, p. 14). The majority then stated that, since it was adopting the reasoning of the *Stovall* dissent, it need not resolve the question whether there was a violation of fair lineup procedures in this case (App. A, *infra*, p. 15).

we have held to have violated Wade's rights, must be omitted" (App. A, *infra* p. 17).

REASONS FOR GRANTING THE WRIT

1. In two cases arising out of State criminal proceedings (*United States ex rel. Stovall* v. *Denno*, No. 254, *Gilbert* v. *California*, No. 223, this Term), this Court will soon have occasion to consider the extent, if any, to which the Sixth Amendment has application to the conduct of a lineup or similar identification procedure. Presumably those cases will provide a definitive answer to that question in the circumstances of this case.

The instant case presents a further question of potential importance—whether the court below went to impermissible lengths in fashioning and applying a novel exclusionary rule, should the Sixth Amendment apply.

Even assuming that the manner in which the lineup was conducted here is subject to criticism, the relief granted by the Fifth Circuit goes far beyond any prior decision. The Fifth Circuit has declared that at a new trial the testimony of the bank employees must be omitted—on the theory that the circumstances under which they identified respondent at the lineup must have colored their identification in court. Such a rule would mean that, no matter how long and clearly a witness saw a defendant at the time of the crime, he could not testify if an improper lineup intervened before trial. In this case, for example, the rule ignores the fact that one of the observing witnesses had picked respondent's photograph from a group shown to her prior to the lineup.

The rule promulgated by the Fifth Circuit goes far beyond the view of the dissenters in *Stovall*. They would require only that the government rest on the courtroom identification of a defendant, and not employ the earlier identification to bolster the testimony. They noted that if defense counsel had brought out the previous identification, "as no experienced counsel would, he would have had only himself to blame" (355 F. 2d at 745). (Here, indeed, it was the defense which originally brought out the lineup identification at trial.) To say that witnesses could not testify to what they saw at the time of the crime and to their recognition of respondent in the courtroom is thus to extend the exclusionary rule to extraordinary lengths.

2. Should the decisions in Nos. 254 and 223 fail to resolve for this case the question whether the conduct of a lineup or similar identification procedure without participation by counsel is a deprivation of constitutional right, we wish to reserve the privilege of arguing that aspect of the question presented above. We of course recognize that in pretrial, non-judicial contacts between government officials and an accused, counsel may serve as a safeguard against possible infringement of the accused's privilege against compulsory self-incrimination. See *Miranda* v. *Arizona*, slip opinion, pp. 33–34, decided June 13, 1966, Nos. 759, 760, 761, 584, O.T. 1965. The privilege, however, covers only testimonial relevations, not exposure to view by witnesses to the offense. *Schmerber* v. *California*, decided June 20, 1966, No. 658, O.T. 1965; *Holt* v. *United States*, 218 U.S. 245, 252–253. The necessity

of counsel in the situation typified by a police lineup therefore presents a quite different question. There is surely a long step between the right to counsel in the criminal trial itself and the asserted right to have counsel present during the conduct of investigative procedures which involve no infringement of the Fifth Amendment privilege. See *Williams* v. *United States*, 345 F. 2d 733 (C.A.D.C.).[4]

[4] In holding that the absence of counsel was prejudicial in this case, the Fifth Circuit stated that counsel could have instructed respondent "to remain silent and not make the verbal responses required of him by the prosecutor". (App. A., *infra*, p. 15). This incorrectly presupposes the applicability of the privilege. The fact that respondent here was asked to repeat a phrase does not automatically make what he said testimonial; on the contrary, courts have generally treated similar procedures as the display of a physical characteristic—rather than an extraction of the defendant's knowledge—and hence not within the protection of the privilege. *Rigney* v. *Hendrick*, 355 F. 2d 710, 714 (C.A. 3); *State* v. *King*, 44 N.J. 346, 357, 209 A. 2d 110 (1965); *People* v. *Lopez*, 60 Cal. 2d 223, 244, 384 P. 2d 16, certiorari denied, 375 U.S. 994 (1964); *State* v. *Freeman*, 408 P. 2d 612, 616 (Kan., 1965); *Boyer* v. *State*, 182 So. 2d 19 (Fla., 1966); *Dyson* v. *State*, 238 Md. 398, 209 A. 2d 609 (1965); Note, 24 Ind. L. Jour. 587 (1949); 8 Wigmore, *Evidence*, § 2265 at p. 396 (McNaughton rev., 1961); McCormick, *Evidence*, § 126 at p. 266 (1954). The fact that "federal and state courts have usually held that [the privilege] offers no protection against compulsion * * * to write or speak for identification * * * to assume a stance * * * or to make a particular gesture" was also noted by this Court in *Schmerber* in holding that the Fifth Amendment protects only against "the compulsion of responses which are also communications" (Slip Op., pp. 6-7).

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

RALPH S. SPRITZER,*
Acting Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
RONALD L. GAINER,
Attorneys.

JULY 1966.

*The Solicitor General has disqualified himself because of his participation in the original decision of the Second Circuit in the *Stovall* case.

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APPENDIX A

In the United States Court of Appeals for the Fifth Circuit

No. 22976

BILLY JOE WADE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal From the United States District Court for the Eastern District of Texas

(March 31, 1966)

Before TUTTLE, Chief Judge, JONES and WATERMAN,* Circuit Judges.

TUTTLE, Chief Judge: Billy Joe Wade was arrested in Houston, Texas, on the 2nd day of April, 1965. He had been indicted by a federal grand jury for the Eastern District of Texas, which charged that, along with Briggs and Pickett, he had conspired with them to rob, and had robbed, a federally insured bank at Eustace, Texas. It is apparent that the indictment was based entirely upon the testimony given by the alleged accomplices, who had been arrested and sentenced on another offense some time earlier.

The trial court appointed counsel on April 26, 1965, at which time Wade was in custody in the Smith County Texas Jail. Thereafter, without notice to

*Of the Second Circuit, sitting by designation.

counsel, on May 12th, the appellant was taken from his cell to the second floor of the courthouse. At that time, the president and cashier of the bank, the only persons who were present at the time of the robbery, were in the courtroom, where a lineup was to take place. They observed Wade, in the hall outside the courtroom in the custody of an officer, and thereafter, following the assembly of five other persons, Wade was put in the lineup of six people. Each of the six men in the lineup had had some bandages affixed to his face in a manner which the witnesses had stated had been worn as a disguise by the person who had robbed the bank. The lineup was conducted by Special Agent Albert of the Federal Bureau of Investigation. The record discloses that while they were in the lineup, "Mr. Albert asked them some questions—to step forward and so forth."

The witnesses, Mr. Gray and Mrs. Chambers, indentified the appellant in the lineup as the individual who robbed the First State Bank of Eustace. Later, at the trial, both Briggs and Pickett testified as to their participation with Wade in the robbery and the identification was repeated by Mrs. Chambers and Mr. Gray. Wade was found guilty by the jury and sentenced by the trial court to serve five years on the first count and fourteen years on the second count, the sentences to run concurrently.

Although the record does not show exactly what oral statements were required to be made by Wade during the lineup, government counsel, in oral argument, commendably conceded that each of the persons in the lineup was required to repeat words something like, "Put the money in this bag", in order that the witnesses could hear similar words to compare with their recollection of the sound of the voice of the person

who gave them such instructions at the time of the robbery.[1]

Appellant's attack on his conviction and sentence here is two-fold. He complains, first, that the manner in which he was brought to the attention of the principal nonaccomplice witnesses against him for identification purposes, amounted to a requirement that he give evidence against himself in violation of the Fifth Amendment, and that, second, subjecting him to the lineup under the circumstances here stated, in the absence of his counsel, after the accusatory stage of the prosecution had commenced, deprived him of the right to counsel at a critical stage of the proceedings in violation of the Sixth Amendment to the Constitution. He says that the later identification by the bank officials in open court was necessarily poisoned by their earlier identification of him conducted in the prejudicial manner outlined, and that, thus, it was error to receive the testimony of the two witnesses who identified in open court. Appellant relies on the cases of *Escobedo* v. *Illinois,* 378 U.S. 298; *Massiah* v. *United States,* 377 U.S. 201.

Appellant concedes that the courts have repeatedly held that an ordinary lineup of an accused person with others for the purpose of having them viewed by victims of the alleged crime for purposes of identification does not run afoul of the self-incrimination provisions of the Fifth Amendment. Although no Supreme Court decision on this precise point has been cited nor found by us, there is the well-known dictum of Mr. Justice Holmes in *Holt* v. *United States,* 218

[1] We deem it appropriate to consider this fact as a part of the record on appeal because, were it not considered, then it would remain as a possible basis for the filing of a petition for post conviction review at a later date, if it is not disposed of on direct appeal at this time.

U.S. 245, where it is said that the prohibition of the Fifth Amendment "is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material."

The Court of Appeals for the Second Circuit, sitting en banc in the case of *United States ex rel Theodore R. Stovall* v. *Denno, Warden,* 2nd Cir. * * * F. 2d * * * , (No. 307, Sept. Term, 1964, decided Jan. 31, 1966), deals with this problem in extenso. We find no reason to express a contrary conclusion so far as relates to the ordinary police lineup which is carried out under conditions which permit the greatest objectivity of viewing the accused with others who are exhibited with him.

When, however, a lineup goes beyond these limits, such as, for instance, requiring him to act out part or all of the crime which it is charged that the perpetrator of the crime performed, we note a very strong caveat. As Judge Friendly of the Second Circuit pointed out in his prior opinion in *Stovall,* when it was first decided by a panel of three judges, (Unpublished opinion, No. 307, Sept. Term, 1964, decided Mar. 31, 1965) the Holmes opinion in the *Holt* case which said, "Moreover, we need not consider how far a court would go in compelling a man to exhibit himself. For when he is exhibited, whether voluntarily or by order, and even if the order goes too far, the evidence, if material, is competent, *Adams* v. *New York,* 192 U.S. 585" was written before *Weeks* v. *United States,* 232 U.S. 383, which, for the first time proscribed the use in the Federal courts of illegally obtained evidence. Following *Weeks,* it does become important in a proper case to determine whether an order requiring that a man "exhibit himself" goes too far.

However, we need not resolve this issue in this case because we are persuaded of the correctness of the position taken by the dissenting judges in the *Stovall* case, when it was decided by the court en banc. There, Judges Friendly, Waterman and Smith found that a compulsory confrontation by an accused person charged in a capital case by taking him to the hospital of one of the victims of the violent crime for identification after his arrest, but before counsel had been appointed for him, violated the principles announced by the Supreme Court in *Massiah* v. *United States*, because, as the dissenting opinions of Judges Friendly and Waterman stated, "The State wishes to make use of him to obtain evidence that will have independent testimonial value."

Here, as was true without question in the *Stovall* case, there is no doubt that the criminal prosecution had commenced and that Wade was, at all times thereafter, entitled "to have the assistance of counsel for his defense." *Hamilton* v. *Alabama*, 368 U.S. 52; *White* v. *Maryland*, 373 U.S. 59. It becomes necessary, therefore, only to determine here whether requiring Wade to submit to a lineup of the character that has been depicted above in the absence of counsel already assigned to him, deprived him of the aid of counsel at a critical stage of the prosecution. At this late date, it cannot be doubted that if Wade had made a confession, instead of being subjected to the lineup and being required to speak certain words formulated by the prosecution, a conviction based on such confession would be void. *Massiah* v. *United States*, 377 U.S. 201. Neither can there be any doubt that if counsel had been notified and had been present, he could have instructed his client, the appellant here, to remain silent and not make the verbal responses required of him by the prosecutor. Counsel,

if present, might also have been able to prevent the placing of the suspect in a place where he could be seen separately by the prospective prosecution witnesses before the lineup took place.

We think it clear that the conduct of the lineup under the circumstances here present, in the absence of counsel, was a violation of Wade's constitutional rights. There remains the question whether such violation was of such a nature as to require a finding that the lack of counsel was prejudicial to Wade.

The test whether error was harmless was last stated by the Supreme Court in *Fahy* v. *Connecticut,* 375 U.S. 85, where the court said, "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." 375 [U.S.] 85, 86. In view of the fact that the identification of Wade by Mr. Gray and Mrs. Chambers at the lineup was six months after the occurrence, and, in view of the fact that Wade was placed, even fleetingly, in a position where he was seen separately by the two prospective witnesses alone, before the lineup, and also because of the compulsory verbal responses made by Wade at the instance of the Special Agent, it cannot be said with any certainty that they would have recognized appellant at the time of trial if this intervening lineup had not occurred. Further, when it is considered that the only other testimony by which Wade was identified with the crime was the testimony of his alleged accomplices, who admitted at trial to inconsistent statements, we would be naive, indeed, were we to hold that "There [was not] a reasonable possibility that the [violations] complained of might have contributed to the conviction." This being the test devised by the Supreme Court as being applicable in its review of a State court conviction, it must be assumed that,

in a Federal court conviction, no less strict a standard applies. The dissenting opinion in *Fahy v. Connecticut,* notes this distinction. 375 U.S. 85, 92.

It appearing, therefore, that the lineup, held as it was, in the absence of counsel, already chosen to represent appellant, was a violation of his Sixth Amendment rights, and, it being plain that the error in not striking the testimony of the two witnesses which we find may well have been colored by the illegal procedure was prejudicial under these applicable legal standards, it follows that the judgment of conviction must be reversed and the case remanded for further proceedings. In the event of a new trial, the evidence of the two bank witnesses, following the occurrence that we have held to have violated Wade's rights, must be omitted.

The judgment is reversed and the case is remanded to the trial court for further proceedings not inconsistent with this opinion.

JONES, Circuit Judge, Dissenting

The effect of the determination of the majority will probably result in the discharge of two persons convicted of bank robbery. The decision of the majority is made, at least in part, on the basis of facts outside the record. These facts are considered, so it is said, in order to avoid having a post conviction proceeding instituted. I am not persuaded that this is any justification for considering on appeal something which was not in the record and not before the trial court. Post conviction remedies were intended to cover situations where the right to relief was not disclosed by the record. It follows from the opinion of the majority that it is improper for observers of a crime to see a person suspected or accused of the offense prior to trial. I had no notion that this was prohibited.

I do not think it has been previously held that putting a suspect or an accused in a line-up and treating him in the same manner as the others are treated is or may be a violation of a constitutional right.

I would follow the decisions cited by the majority rather than the dissenting views in those cases. Therefore I dissent.

APPENDIX B

United States Court of Appeals For the Fifth Circuit

October Term, 1965

No. 22976

D. C. Docket No. 6805—Criminal Action

BILLY JOE WADE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the Eastern District of Texas

Before TUTTLE, Chief Judge, JONES and WATERMAN,* Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

JONES, Circuit Judge, dissents.

March 31, 1966.

Issued as Mandate: May 19, 1966.

* Of the Second Circuit, sitting by designation.

APPENDIX C

In the United States Court of Appeals for the Fifth Circuit

No. 22,976

U.S. Court of Appeals, filed May 11, 1966, Edward W. Wadsworth, Clerk.

BILLY JOE WADE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the Eastern District of Texas

(May 11, 1966)

ON PETITION FOR REHEARING

Before TUTTLE, Chief Judge, JONES and WATERMAN*, Circuit Judges.

Per curiam:

It is ordered that the petition for rehearing filed in the above styled and numbered cause be, and the same is, hereby denied.

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*Of the Second Circuit, Sitting by designation.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 334

UNITED STATES OF AMERICA, PETITIONER

v.

BILLY JOE WADE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (R. 44–49) is reported at 358 F. 2d 557.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1966 (R. 50). A petition for rehearing *en banc* was denied on May 11, 1966 (R. 51). On June 15, 1966, Mr. Justice Black extended the time within which to file a petition for a writ of certiorari to and including July 11, 1966 (R. 52). The petition for a writ of certiorari was filed on July 11, 1966, and certiorari was granted on October 10, 1966 (R. 53). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the fact that a lineup (at which respondent and the five or six other participants were asked to utter a specified sentence) was conducted after indictment and without notification to respondent's counsel required exclusion of the courtroom identification of respondent by the witnesses who had identified him at the lineup.

STATEMENT

Respondent was convicted after a trial by jury, in the United States District Court for the Eastern District of Texas, under a two-count indictment charging that he conspired to rob, and did rob, a federally insured bank in violation of 18 U.S.C. 371 and 2113 (a) and (d) (R. 1–3). He was sentenced to imprisonment for five years on the conspiracy count and for fourteen years on the robbery count, the sentences to run concurrently (R. 42–43). The court of appeals reversed, one judge dissenting (R. 44–50).

1. The evidence showed that a bank in Eustace, Texas, was robbed on September 21, 1964. While one man waited outside in a parked automobile, another man, with a small strip of tape on each side of his face, entered the bank, aimed a pistol at Jean Chambers and Lee Gray, the bank's two employees, handed them a pillow case, and ordered them to fill it with currency. The employees complied. The robber then fled with his accomplice in a waiting car (R. 7–19, 27–31; Tr. 135–139, 188–189, 195).[1]

[1] "Tr." refers to the typewritten transcript of the trial proceedings.

On March 23, 1965, an indictment was returned charging respondent and two others (named Pickett and Briggs) with conspiring to rob the Eustace bank, and charging respondent and Briggs with executing the robbery (R. 1–3).[2] Respondent was arrested on April 2, and on April 26 an attorney was appointed to represent him (R. 5). On May 12, without notice to respondent's appointed counsel, respondent and five or six other prisoners were taken from their jail cells for the purpose of appearing in a lineup before the two bank employees who had witnessed the robbery (R. 22–23, 30–31, 37). The prisoners were assembled in the hall outside the courtroom in which Mrs. Chambers and Mr. Gray were seated (R. 22–23). A door between the courtroom and the hall was opened (R. 22–24, 34), and Mrs. Chambers caught "[j]ust a glance" of respondent (R. 24). She saw no one else in the hall and did not know whether or not respondent was in custody or under guard (R. 23). Mr. Gray was also able to see through the open doorway, and observed Kenneth Albert, whom he knew to be an F.B.I. agent (R. 34). He also saw a person who "resembled" respondent (R. 34) but could not say definitely that it was respondent (R. 32–33). The prisoners, including respondent, were then brought into the courtroom (R.

[2] In February and March, 1965, Pickett and Briggs, who had earlier been sentenced, on guilty pleas, for the robbery of a San Antonio bank, but who had denied robbing the Eustace bank, gave written statements to F.B.I. agents acknowledging their complicity in the Eustace robbery and disclosing respondent's involvement (Tr. 96–98, 100–101, 103, 174–175, 178–179).

24). All wore tape on their faces (R. 24–25, 31) as had the robber of the bank (R. 11, 30). Each was asked to repeat the phrase, "Put the money in this bag", or words of similar import.[3] The two employees identified respondent as the man who had committed the robbery (R. 24, 31, 35).

2. At trial, after respondent's two accomplices testified on behalf of the government,[4] Mrs. Chambers described the robbery in detail (R. 7–19) and identified respondent as the man who had taken the money at gunpoint (R. 12). At the time of the robbery, she stated, he wore grey khaki pants, a long-sleeved sport shirt, and a straw hat. He had carried a nickel-plated gun and a pastel-striped pillow case, and had strips of tape affixed to his face (R. 11–12). On cross-examination, defense counsel elicited the fact that after the robbery the witness had picked respondent's picture out of a group of eight or nine photographs (R. 20). Defense counsel also elicited, for the first time, the fact that respondent had been identified by Mrs. Chambers at the lineup on May 12 (R. 22–25).

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[3] The fact that the prisoners were asked to repeat words does not appear in the record. It was disclosed by government counsel on oral argument before the court of appeals, and was considered by a majority of the panel in order to remove the fact "as a possible basis for the filing of a petition for post conviction review at a later date" (R. 45 n. 1).

[4] Pickett testified that he had helped plan the robbery with respondent and Briggs but that he had decided not to participate in its execution since he was well known in the area (Tr. 71). Briggs testified that he was the one who had driven the automobile and that respondent was the one who had entered the bank (Tr. 134–139). Prior to respondent's trial, both Pickett and Briggs had pleaded guilty to the present indictment and had been sentenced (Tr. 103–104, 108; see Tr. 16).

Gray also described the holdup of the bank (R. 27–31) and identified respondent as the robber (R. 29). He stated that respondent had worn grey khaki trousers, a long-sleeved sport shirt, and a broad-brimmed straw hat (R. 31), that he had carried a nickel-plated pistol (R. 28), and that he had a strip of tape on each cheek (R. 30). Just before the conclusion of the direct examination, Gray was questioned briefly concerning the lineup which had been revealed in the cross-examination of Mrs. Chambers (R. 30–31). Gray's cross-examination related principally to the pre-lineup observation, through the open door, of agent Albert and the man resembling respondent (R. 32–35).

At the conclusion of the testimony, defense counsel moved for a judgment of acquittal on the ground that respondent's Fifth and Sixth Amendment rights were violated when the lineup was conducted without notice to respondent's attorney. Counsel also moved to strike the identification testimony of the two bank employees (R. 38–39). The motions were denied (R. 39).

3. The court of appeals, one judge dissenting, reversed respondent's conviction on the ground that the post-indictment lineup in the absence of respondent's appointed counsel violated respondent's Sixth Amendment rights. The majority expressly adopted the view of the dissenting judges in *United States ex rel. Stovall* v. *Denno*, 355 F. 2d 731 (C.A. 2, *en banc*), certiorari granted, 384 U.S. 1000. The dissenters in *Stovall* believed that an indicted defendant is entitled to the assistance of counsel when the government "wishes to make use of him to ob-

tain evidence that will have independent testimonial value" (R. 47), whether or not the desired evidence is of the kind protected by the Fifth Amendment. The majority in this case said that, had counsel been present, he could have instructed respondent not to make the responses requested for purposes of voice identification, and that he could have prevented the situation whereby the bank employees saw respondent before the lineup took place (R. 47–48). In the circumstances, the majority found that the "illegal procedure" might well have prejudicially colored the bank employees' courtroom identification (R. 48–49). The majority concluded that reversal was required, and that in the event of a new trial "the evidence of the two bank witnesses, following the occurrence that we have held to have violated Wade's rights, must be omitted" (R. 49).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case, together with *Gilbert* v. *California,* No. 223, this Term, and *Stovall* v. *Denno,* No. 254, this Term, present the question whether the clause of the Sixth Amendment which guarantees to an accused in a criminal prosecution "the assistance of counsel for his defence" requires that a defendant's attorney be given notice and an opportunity to be present at a witness' pretrial identification of the defendant. Our basic position is that a witness' pretrial identification of the features or voice or mannerisms of an accused is not a stage of the criminal proceeding within the meaning of the Sixth Amendment's guarantee of counsel. Unlike the various

other phases of a criminal proceeding to which this Court has held the assistance-of-counsel clause applicable, a pretrial identification does not involve the presentation, preparation or preservation of any part of an accused's "defence." Whether it occurs before or after indictment, identification is not a stage of the adversary process by which guilt or innocence is determined; it is, rather, part of the prosecutor's preparation of his case—to determine the extent of the witness' knowledge or to verify the reliability of his prospective testimony. We urge that a defendant is no more constitutionally entitled to have his attorney present at a witness' pretrial identification of an accused than during any other portion of a prosecutor's pretrial interview of that witness.

1. The government's investigation and preparation of a criminal prosecution for trial is, by its very nature, an *ex parte* process. The prosecutor, like the defendant, prepares his case in privacy, and the interviewing of witnesses and their identification of weapons carried by an offender, clothing worn by him, or the physical appearance of the offender are all phases of the process of interview and preparation. There is no meaningful difference between a witness' pretrial identification from photographs and a similar identification made at a lineup. It has never been suggested that counsel must be present at the former, and the latter should be subject to the same rule.

This is completely consistent with the policies underlying the Sixth Amendment's guarantee of counsel. Fairness requires that an accused be represented and advised by an attorney whenever he joins issue in an

adversary proceeding with the prosecution—which is also represented by legal counsel. But a pretrial identification—whether or not it takes the form of a lineup—is not an adversary proceeding. The accused is present not because—as is true in an interrogation—information is being sought *from him;* he is there only so that others, from whom information is being sought, will be able to observe him. And since the constitutional privilege against self-incrimination is not in jeopardy in these circumstances, the assistance-of-counsel guarantee is not needed to protect that constitutional right.

Nor is the accused's presence the touchstone for determining whether there is a constitutional right to counsel. There are many instances in which only ministerial acts are done in the accused's presence, and the critical aspect of that phase of the investigation occurs in the accused's absence. It would be anomalous, for example, to require counsel to be present when an accused is fingerprinted or photographed, but to allow the comparison of fingerprints or the identification of photographs to be conducted in his absence.

Finally, counsel has no attorney's function to perform at a pretrial identification. The law-enforcement officials who have the accused in custody would not be obliged to heed his suggestions regarding lineup procedures. At most, he is an additional witness to what occurs—a subject on which the accused may personally report or testify in substantial detail. Nor is counsel needed to advise an accused on the exercise of constitutional rights, since no constitutional rights

are jeopardized by a pretrial identification (as contrasted with an interrogation). To the extent that counsel's presence might tend to promote fair procedures, he is more needed at those phases of the investigation and preparation of a case from which an accused is absent than at the stages where the defendant's physical presence is required.

2. The lineup in this case violated no Fifth Amendment privilege against self-incrimination; respondent was not asked to provide any evidence whatever "of a testimonial or communicative nature" within the meaning of *Schmerber* v. *California,* 384 U.S. 757. Observation by witnesses of respondent's appearance and physical characteristics infringed no constitutional privilege. And in asking respondent to speak a prescribed sentence, the government was not compelling any form of testimonial disclosure. All it was obtaining from respondent was a display of the sound of his voice—as much a physical characteristic as his size, the color of his hair, or his gait.

3. Even assuming, *arguendo,* that it was improper to conduct the pretrial identification in the absence of counsel, the only evidence which would be subject to exclusion on account of this failure would be the "product" of the illegality. The court below went far beyond barring affirmative use by the prosecution of testimony relating to the lineup (which was the remedy urged by the dissenters in the *Stovall* case, No. 254, this Term); it held that the immediate victims of the crime might not identify the accused at the trial because they had been present at the lineup. Particularly in light of the facts of this case—where it

is entirely clear that the witnesses had ample opportunity to observe the robber when the crime was being committed and where one of the witnesses identified respondent from a photograph prior to the lineup—the courtroom identification cannot be deemed to have "been come at by exploitation" of the illegal lineup within the standard of *Wong Sun* v. *United States,* 371 U.S. 471, 488, recently re-affirmed in *Hoffa* v. *United States,* No. 32, this Term, decided December 12, 1966. No affirmative use of the lineup identification was made by the prosecution in this case. Consequently, irrespective of how the Court resolves the constitutional issue in *Gilbert, Stovall,* and this case, respondent's conviction should be reinstated.

ARGUMENT

I

PRETRIAL IDENTIFICATION OF AN ACCUSED IS NOT A STAGE OF THE CRIMINAL PROCEEDING WITHIN THE ASSISTANCE-OF-COUNSEL GUARANTEE OF THE SIXTH AMENDMENT

This Court's decisions establish beyond doubt that an individual accused in State or federal courts on a felony charge is constitutionally entitled to the assistance of counsel at every "critical stage in a criminal proceeding." *Hamilton* v. *Alabama,* 368 U.S. 52, 53–54; *White* v. *Maryland,* 373 U.S. 59; *Massiah* v. *United States,* 377 U.S. 201. The court below deemed that constitutional rule applicable here; the proposition on which it rested its decision reversing respondent's conviction was that government agents had "deprived him of the aid of counsel at a critical stage

of the prosecution" (R. 47)—*i.e.*, at the lineup where he was identified by the employees of the robbed bank. The court's characterization of the lineup as a "stage of the prosecution" (R. 45) reflected, we believe, a basic misapprehension of the nature and function of pretrial identification and, by the same token, an erroneous view of the protection afforded by the assistance-of-counsel guarantee of the Sixth Amendment. Pretrial identification is not, in any theoretical or practical sense, part of the formal adversary proceeding in which respondent's guilt or innocence is determined. Nor (whether it occurs before or after indictment) is it a preliminary stage of the criminal proceeding. Whatever the form of the identification procedure—whether it be a live "lineup" (otherwise called "show-up" or "identification parade") or a victim's face-to-face confrontation with a single accused (as in *Stovall*) or an identification made by a witness from photographs or motion picture film—it is a phase of an evidence-gathering investigation or merely one aspect of a prosecutor's preparation of the proof he intends to present at trial. The Sixth Amendment accords a defendant no greater right to have counsel present at such an identification than at any other juncture of the investigation or of the preparation of the prosecution's case.

1. *The nature of pretrial identification.*—The court below erred, we believe, because it confused two distinct processes which normally occur after criminal charges are filed and before trial is begun. One is the series of formal adversary proceedings preliminary to the trial itself, such as preliminary hearing, arraign-

ment, and pre-trial motions. Here an accused is plainly entitled to counsel's presence because he would otherwise be joining issue with the prosecution at a great disadvantage. The second pretrial process, which is different in kind from the more formalized adversary stages, consists of each side's investigation and preparation for trial. An accused is, of course, entitled to counsel to help him prepare his own defense. *Powell* v. *Alabama,* 287 U.S. 45. But preparation is, by its very nature, an *ex parte* process. Prosecutors are not entitled to be present when the defense investigates and prepares its case, and defense counsel have no constitutional right to participate in the prosecution's preparation or in its continuing investigations.

Investigation of a criminal charge does not, of course, end with the arrest of the accused or his indictment by a grand jury. The principle that probable cause is sufficient to sustain an arrest or an indictment is proof enough that our legal system does not contemplate that the prosecution's investigative efforts cease at that preliminary juncture. The fact is that in many instances substantial investigation after arrest or indictment is a necessity. Additional witnesses may be discovered and interrogated, handwriting may be compared, reports by ballistics experts may be analyzed, and finger and footprints may be taken and examined. All of these investigative steps, and others as well, may occur after an individual believed to be the perpetrator of the crime has been arrested or formally charged.

Pretrial identification through a lineup or by a confrontation between an accused and a victim or witness (in which the accused is not interrogated or otherwise requested to make testimonial disclosures) is, in essence, part of the prosecution's interview *of the witness*. The accused is, of course, present, but the evidence being sought is that of the witness. It is the witness who is requested to tell part of his story (*i.e.*, his description of the guilty man) in a meaningful, accurate and efficient manner by which the accuracy of his testimony may also be verified; the accused is present only as the object of the witness' observation. He is, in this respect, like an inanimate item of evidence which the witness might, in the course of the pretrial interview, be asked to examine. The presence of a defendant's counsel is plainly not required, for example, when, in the course of a pretrial interview, a witness is shown the accused's clothing or his automobile or any object he was believed to have carried or worn when he committed the offense. The same is true, we submit, when the accused is personally exhibited to the witness at that juncture.[5]

[5] This hypothetical demonstrates, we submit, that there is a substantial difference between counsel's absence at a pretrial interview and at trial. Obviously counsel could not be excluded when, in the course of trial, a witness identifies a weapon as having been used during the robbery, although it seems quite clear that he has no right to be present when, prior to trial, the witness first identifies the weapon in the prosecutor's office. Compare Judge Friendly's suggestion in his dissenting opinion in *Stovall* (355 F. 2d 731, 742, 743, and n. 3) that if counsel could not be excluded at trial he should not be excludible at any prior identification after the right to counsel has attached.

Indeed, pretrial identification may be accomplished by means which do not require the accused's personal and knowing participation. A witness may, for example, be shown a series of photographs, among which is a likeness of the accused, or a motion picture film in which the accused appears in a group.[6] Or if an indicted defendant has been released on bail, law-enforcement officials might bring a witness to the neighborhood of the accused's home or place of business and have the witness observe the defendant on a public street to advise whether his appearance is familiar. And a defendant who has not been released on bail might be observed by a witness in his prison cell.

There is no meaningful distinction, we submit, between these identifications and the lineup involved here and in *Gilbert* v. *California*, No. 223, this Term. The techniques of pretrial identification vary, of course, in the extent to which they afford verification of the accuracy of the witness' testimony. A lineup or a showing of a series of photographs tests the witness and may provide, in certain circumstances, reasons to doubt the truth of his story; observation of the accused when he is unaccompanied is a less reliable indicator of the witness accuracy or probity. But, in all these instances, the identification is part of the prosecution's interview of the witness—whether for preparation or investigation purposes—and it has never

[6] Such use of motion pictures as an identification technique has been suggested by Professor Wigmore. Wigmore, *The Science of Judicial Proof* (3d ed. 1937) § 253 at 541; Note, 25 Ill. (Northwestern) L. Rev. 550 (1931).

been suggested that defense counsel is entitled either to be informed that the prosecutor intends to conduct the interview in this manner or to be present when it actually takes place.

2. *The Sixth Amendment assistance-of-counsel guarantee.*—The Sixth Amendment assures an accused in any criminal prosecution of "the right * * * to have the assistance of counsel for his defence." That guarantee means, as this Court observed in *Gideon* v. *Wainwright,* 372 U.S. 335, 344, "that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." At the heart of the Sixth Amendment's guarantee is the proposition that where the government and the accused join issue in an adversary proceeding, a defendant may not be handicapped by being forced to fend for himself against a trained prosecutor. The right extends, of course, not merely to the trial itself—where a skilled attorney is needed to steer the defense through the technicalities and nuances of formal legal proceedings—but to preliminary stages where the government is formally aligned against the defendant and he is called upon to make choices which have lasting legal significance. In all of these situations the procedural and substantive complexities of modern criminal law plainly exceed the comprehension of even a well educated layman. *Powell* v. *Alabama,* 287 U.S. 45, 69. In order to assure that an accused's vital interests will be adequately protected it is essential that a trained attorney represent him, just as a trained attorney repre-

sents the government. "To pit a layman against a trained prosecutor, operating under the complex procedural and evidentiary rules of the courtroom, creates a serious risk that a man who ought to win his case will lose it." Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Calif. L. Rev. 929, 946 (1965).

The Sixth Amendment does not, however, give an accused's counsel a constitutional right of entree to the informal and non-judicial processes of investigation and preparation of the government's case. These processes involve no adversary confrontation between the government and the accused; there is no danger that the accused, if unrepresented, will be overborne by a trained prosecutor. There is, in short, no unfairness in permitting the prosecutor to build and prepare his case in the same privacy as an accused's counsel fashions his defense. And even if the presence of the accused is required for some part of the government's post-indictment investigation, that does not, *ipso facto*, entitle the accused to have his attorney present.

This view of the protection afforded by the Sixth Amendment is not inconsistent with *Massiah* v. *United States*, 377 U.S. 201, *Escobedo* v. *Illinois*, 378 U.S. 478, or any other decision concerning an interrogation or other conduct aimed at eliciting incriminating *testimonial* disclosures from an accused. When the prosecution seeks, after indictment, to obtain admissions from a defendant either by subterfuge (as in *Massiah*) or by open interrogation (as in *Spano* v. *New York*, 360 U.S. 315), it is directly confronting

the accused and seeking testimonial proof *from him*. In every real sense, such a practice is an adversary confrontation between the prosecution and the defendant, and the latter may not then be handicapped by being denied the legal assistance to which he is entitled at trial and at all preliminary legal proceedings.[7] Although the presence of the accused is necessary for certain kinds of pretrial identification, the prosecution is not thereby seeking anything *from him*. A lineup does not, in other words, create a situation in which the government is pitted against the defendant. Consequently, the Sixth Amendment guarantee in inapplicable.

Moreover, any custodial *interrogation* calls into play the protections needed to safeguard the constitutional privilege against self-incrimination which this Court discussed in *Miranda* v. *Arizona*, 384 U.S. 436. Counsel is entitled to be present at a post-arrest or post-indictment interrogation, whether open or secret, because the constitutional privilege is at stake. The same is obviously not true of a custodial *identification* at which the accused is asked no questions and permitted to make no admissions. The Fifth Amendment privilege against self-incrimination is not endangered in such circumstances (see pp. 25–29, *infra*),

[7] The separate opinions in *Spano* (360 U.S. at 326, 327) and the majority opinion in *Massiah* (377 U.S. at 204–206) observed that post-indictment interrogations of a defendant aimed at eliciting a confession are a means of bypassing an orderly public trial and rendering it superfluous. The Court's opinion in *Escobedo* v. *Illinois*, 378 U.S. 478, 487, made the same point by noting that if interrogation in the absence of counsel were permitted, the trial would become "no more than an appeal from the interrogation * * *."

and counsel is not needed to secure it against invasion. See *Schmerber* v. *California,* 384 U.S. 757, 765–766.

3. *The presence of the accused.*—To be sure, personal identification of a defendant (as contrasted with photograph identification) differs from other forms of government preparation and investigation in that it requires the physical presence of the accused. The court below adopted the position taken by the dissenters in *Stovall* (355 F. 2d 731, 743) that an accused has an absolute right to the presence of counsel whenever the prosecution "wishes to make *use of him* to obtain evidence that will have independent testimonial value" (R. 47; emphasis added). We submit that the presence of the accused is immaterial for Sixth Amendment purposes when he is being "used" only in the sense that he is "the source of 'real or physical evidence' * * *" (*Schmerber* v. *California,* 384 U.S. 757, 764). As we demonstrate at pp. 19–25, *infra,* a lawyer does not, in such circumstances, act as legal counsel to the accused but merely as a bystander and witness.[8]

Moreover, a rule which would draw the line between what may and what may not be done in the absence of counsel on the basis of the accused's physical presence would, in many of its applications, bear no relation to any conceivable purpose of the assistance-of-counsel

[8] We also note that, in any event, the prosecution did not, in this case, seek to use the pretrial identification as "evidence that will have independent testimonial value." Unlike *Stovall*, testimony concerning the lineup was first introduced in this trial by the defense and was not referred to by the prosecution other than in response to the defense cross-examination (see pp. 34–36, *infra;* R. 19–25, 30–31).

guarantee. If presence of the accused is the touchstone, counsel would be entitled to be present when an indicted defendant in custody is being fingerprinted or when hair, nail, skin or blood samples are taken from him. But since the accused is not present when the fingerprints are compared or when the samples are analyzed in a laboratory, his attorney could be absent at the stage when the critical determination is being made. Similarly, if a witness is asked to identify a defendant from photographs, counsel would—under the rule of the court below—be present when the the picture is taken but not when it is examined by the witness.

The infirmity of the rule adopted by the court below and by the dissenters in *Stovall* is further demonstrated by the anomalous results to which its logic would lead. Must counsel for an indicted defendant be called in before the defendant is searched incidental to his arrest or before he is photographed and fingerprinted as part of standard "booking" procedure? Must counsel for a defendant who is free on bail be advised whenever a government witness is taken to observe the accused on a public street for identification purposes? In each of these cases evidence of "independent testimonial value" is obtained as a result of the defendant's presence after the right to counsel has attached. Obviously, we submit, it is not the presence or absence of the defendant which controls the application of the constitutional guarantee.

4. *The function of counsel.*—An additional indication that an indicted defendant has no constitutional right to have an attorney present when he is being

identified prior to trial is the very limited function that an attorney could serve in such circumstances. A lineup is not an adversary proceeding over which a judge presides and where objections may be made and ruled upon. Law-enforcement officials who have a defendant in custody are not obliged to hear his attorney's objections to the procedures they employ for pretrial identification, much less to adjust their lineup to the attorney's views of what is appropriate. Consequently, the court below erred when it hypothesized that "[c]ounsel, if present, might also have been able to prevent the placing of the suspect in a place where he could be seen separately by the prospective prosecution witnesses before the lineup took place" (R. 48). Whether counsel could have prevented this incident—which appears, at any rate, to have been quite accidental, if it occurred at all (see pp. 37–38, *infra*)—is highly speculative. It is clear, however, that counsel could not have asserted any legal right to prevent it from happening. At most, he would have been an additional witness to circumstances which the defendant himself was able to see and report, and to which he was fully capable of testifying.*

Nor does the defendant need the advice of counsel to assert some legal right at a lineup. "There is no

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* In England, the presence of the accused's counsel is permitted at a lineup (identification parade) under a rule of procedure. It is well recognized, however, that he has no active function to perform. An accused "must be told that he may have his solicitor or a friend present, provided, of course, that they take no part in the proceedings * * * [I]n the improbable event of such a person attempting to interfere with the conduct of the parade, there is the simple remedy of ejection * * *." Williams, *Identification Parades*, [1955] Crim. Law Rev. (Eng.) 525, 528.

law or decision which says that a man, free or incarcerated, has a constitutional right not to be observed and possibly identified as the perpetrator of a crime." *Rigney* v. *Hendrick,* 355 F. 2d 710, 712 (C.A. 3), certiorari denied, 375 U.S. 975. As the Court of Appeals for the District of Columbia Circuit commented in a recent case involving testimony by witnesses of a post-arrest confrontation of an accused who was unrepresented by counsel: "The absence of counsel at the time of the confrontation at the scene of the crime did not deprive Appellant of a right to silence, a right to withhold evidence or any other right which could have been effectively asserted had counsel been present." *Kennedy* v. *United States,* 353 F. 2d 462, 466. The majority of the court in the *Stovall* case (355 F. 2d 731, 739) observed:

> If Stovall had had counsel, what could counsel have done to thwart the identification? He could not have arranged to have Stovall continuously wear a hood or mask over his face to avoid identification, nor could he have ordered the police forthwith to halt their identification activities * * *

See also *Gilbert* v. *United States,* C.A. 9, No. 19,940, decided September 16, 1966, pending on writ of certiorari, No. 1011 Misc., this Term; *Williams* v. *United States,* 345 F. 2d 733 (C.A.D.C.), certiorari denied, 382 U.S. 962; *People* v. *Lopez,* 60 Cal. 2d 223, 241–243, 384 P. 2d 16, certiorari denied, 375 U.S. 994.

We demonstrate at pp. 25–29, *infra,* that there was no violation of the Fifth Amendment's privilege against self-incrimination in requiring the accused to appear in the lineup or to recite words which were

not "of a testimonial or communicative nature" (*Schmerber* v. *California*, 384 U.S. 757, 761). Quite clearly, therefore, counsel was not needed, as he would be in case of an interrogation, to safeguard the Fifth Amendment privilege. The majority of the court below concluded, however, that counsel could have advised the accused that he was under no legal obligation to "make the verbal responses required of him by the prosecutor" (R. 48)[10]—*i.e.*, that he could refuse (albeit not on constitutional grounds) to submit to voice identification. (But see pp. 28–29, *infra*.) It has never been suggested, however, that when no constitutional right is endangered, an individual is entitled to an attorney to advise him that there is no legal obligation to cooperate with the police. The defendant's legal option of refusing to cooperate is no different here than where investigators interview a suspect who is not in custody. Apart from the privilege against self-incrimination (which is not in jeopardy in the absence of the "inherently compelling pressures" (*Miranda* v. *Arizona*, 384 U.S. 436, 467) of *custodial* interrogation), the suspect who is at liberty also has a non-constitutional right to refuse to cooperate. That right has not, however, been deemed to require the advice and assistance of counsel. See, *e.g.*, *Kohatsu* v. *United States*, 351 F. 2d 898 (C.A. 9), certiorari denied, 384 U.S. 1011; cf. *Kitchell*

[10] By "prosecutor" the court apparently meant the F.B.I. agent. No government attorney was present, and contrary to the claim first made in respondent's brief in the court below, the F.B.I. agent himself was not a lawyer. See the affidavit of the F.B.I. agent dated November 19, 1965, which was appended to the government's brief below. Appendix, *infra*, pp. 37–38.

v. *United States*, 354 F. 2d 715, 720 (C.A. 1), certiorari denied, 384 U.S. 1011. See also *Schmerber* v. *California*, 384 U.S. 757, 765–766.

Nor is counsel constitutionally entitled to be present simply because his presence might contribute to the fairness of the identification. That same argument could be made with respect to all facets of a criminal investigation—both before and after a suspect's arrest or indictment. The Court of Appeals for the Ninth Circuit recently answered the same contention in *Gilbert* v. *United States*, No. 19,940, decided September 16, 1966, pending writ of certiorari, No. 1011, this Term, slip op. pp. 27–28:

> The same arguments as to assistance that counsel might render could also be made as to the taking and analysis of blood samples (*Schmerber v. California, supra*), the taking and comparison of fingerprints (*Smith v. United States*, D.C. Cir., 1963, 324 F. 2d 879), the obtaining and comparison of handwriting exemplars (*State v. Fisher*, Ore., 1966, 410 P.2d 216; *People v. Graves*, Cal., 1966, 411 P.2d 114), and to many other investigative procedures. As to each of these activities, and others like them, it can be argued that matters of judgment and proper procedure can vitally affect the result. Why, then, should not defense counsel, accompanied by experts participate in all of them, from beginning to end, to see that acceptable, fair procedures are used, scientific standards are maintained, and only the very best evidence is thus developed? One answer, we would think, lies in the need for expedition. Another is the disruptive effect upon investigators who would have opposing counsel breathing down

> their necks. We are inclined to doubt that once it began to appear that the evidence was likely to point to the guilt of the accused, his counsel's participation would be constructive. Another is that a criminal trial is not supposed to be a sporting contest. We conduct it as an adversary proceeding. But that does not mean that everything done by the state, preparatory to trial, for the purpose of proving or disproving guilt, is suspect as sloppy or biased or fraudulent.

It is possible, for example, for a prosecutor improperly to implant testimony in a witness' mind when he interviews that witness, or to suggest to a witness which of several photographs he should identify or how to describe the clothing worn by the offender when he committed the crime. The fairness of a lineup, like the fairness of any other phase of an investigation, is insured not by the presence of counsel but by "full exposure of the facts at trial, through cross-examination and the presentation of contrary evidence, and * * * the impartiality and good sense of the judge and jury." *Gilbert* v. *United States, supra,* at p. 28; see *Payne* v. *United States,* 294 F. 2d 723, 726 (C.A.D.C.), certiorari denied, 368 U.S. 883.

Indeed, if it is to insure the fairness of investigative procedures that the right to counsel is to be accorded in these circumstances, there is less reason to require counsel's presence when the accused himself is being "used" than when the accused is absent. When the defendant is present—as he is during a lineup—he may personally observe the circumstances, report

them to his attorney,[11] and (if he chooses to take the stand) testify about them at trial.[12] When the prosecutor interviews a witness in the absence of an accused, on the other hand, there is no one present to verify the fairness of the interview or to report any irregularities. If the prosecution were tempted to engage in "sloppy or biased or fraudulent" conduct (*Gilbert* v. *United States, supra*), it would be far more likely to do so when the accused is absent than when he himself is being "used."

II

THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION IS NOT VIOLATED WHEN THE FEATURES, MANNERISMS, OR VOICE OF AN ACCUSED IN CUSTODY ARE SUBJECTED TO PRETRIAL IDENTIFICATION

A. *Appearing before a witness to the offense involves no testimonial communication.*

Neither the decision of the majority below, nor the dissenting opinion in *United States ex rel. Stovall* v. *Denno*, 355 F. 2d 731 (C.A. 2, *en banc*), certiorari granted, 384 U.S. 1000, on which the court below relied, held that an accused's pretrial identification by a witness to the offense violated the accused's Fifth

[11] That was apparently done here since respondent's counsel knew the circumstances of the lineup at the time of trial (R. 22–23, 32–33).

[12] If the accused's contention is that the identification procedure was so unfair that it would violate due process even to admit it in evidence (see *Palmer* v. *Peyton*, 359 F. 2d 199 (C.A. 4)), he could take the witness stand, in the absence of the jury, on a motion to suppress or exclude the evidence, without waiving his Fifth Amendment privilege not to testify during the trial itself.

Amendment privilege against self-incrimination.[13] The privilege "protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature."[14] *Schmerber* v. *California,* 384 U.S. 757, 761. It is a "prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material." *Holt* v. *United States,* 218 U.S. 245, 252–253. Placing respondent in a lineup, in order that witnesses to the bank robbery might observe his physical characteristics, involved no breach of his Fifth Amendment privilege. His appearance and movements did not communicate a state of mind or have any other testimonial significance. He and the other participants in the lineup were simply put on display so that witnesses might compare them with their memories of the physical characteristics previously displayed to them by the perpetrator of the offense. There being no testimonial revelation in the process, an accused may be viewed in the courtroom by an identifying witness

[13] Chief Judge Lumbard, concurring, and Judges Friendly and Waterman, dissenting, agreed with the majority in *Stovall* that the Fifth Amendment privilege was not involved in an accused's pretrial exposure to the view of an identifying witness (355 F. 2d at 741 and 743). The court in the present case found "no reason to express a contrary conclusion so far as relates to the ordinary police lineup which is carried out under conditions which permit the greatest objectivity of viewing the accused with others who are exhibited with him" (R. 46).

[14] Testimonial evidence "otherwise" provided may be by writing, nodding or shaking one's head, signaling, or, as suggested in *Schmerber*, 384 U.S. at 764, by responding physiologically in a polygraph examination.

(*Peoples* v. *United States*, 365 F. 2d 284 (C.A. 10)) or by the jury in order to compare his features with a description in evidence. See *Holt* v. *United States*, 218 U.S. 245, 252–253. See also *United States* v. *Evans*, 359 F. 2d 776 (C.A. 3); *Caldwell* v. *United States*, 338 F. 2d 385 (C.A. 8); 8 Wigmore, *Evidence*, § 2265 at p. 386 (McNaughton rev. 1961).

B. *Speaking a prescribed sentence before a witness to the offense involves no testimonial communication.*

1. Similarly, requiring respondent and the other participants in the lineup to speak a prescribed sentence in order that the witnesses to the offense might hear and attempt to identify the sound of the offender's voice involved no breach of any Fifth Amendment privilege. It is communication and not the physical act of speech which is constitutionally protected. One's voice is, in itself, "as much a physical characteristic as the color of his eyes" (*Gilbert* v. *United States*, C.A. 9, No. 19,940, decided September 16, 1966, pending on writ of certiorari, No. 1011 Misc., this Term, slip op. p. 18), and the fact that it is a common means of achieving communication is incidental in this context. Individual manners of speaking or writing may be displayed without testimonial communication. Here respondent and the other participants were told what to say; the only thing sought to be revealed was the sound of their voices so that witnesses might compare these sounds with those they heard at the time of the robbery. What was involved was an exhibition of a physical characteristic for purposes of comparison rather than an extraction of knowledge for the purpose of securing

evidence of guilt. Since such a situation presents no "attempt * * * to secure a communication—written, oral or otherwise—upon which reliance is to be placed as involving his consciousness of the facts and the operations of his mind in expressing it, the demand made upon him is not a testimonial one" and the privilege against self-incrimination is not involved.[15] 8 Wigmore, *Evidence*, § 2265 at p. 386 (McNaughton rev. 1961); Note, 24 Ind L.J. 587 (1949). See also *State* v. *King*, 44 N.J. 346, 357, 209 A. 2d 110; *People* v. *Lopez*, 60 Cal. 2d 223, 244, 384 P. 2d 16, certiorari denied, 375 U.S. 994; *State* v. *Freeman*, 408 P. 2d 612, 616 (Kan.); *Boyer* v. *State*, 182 So. 2d 19 (Fla.); *Dyson* v. *State*, 238 Md. 398, 209 A. 2d 609; cf. *State* v. *Ramirez*, 76 N.M. 72, 412 P. 2d 246, 248; *Commonwealth* v. *Aljoe*, 420 Pa. 198, 216 A. 2d 50, 52–53.

2. It is immaterial that an accused must cooperate, *i.e.*, undertake to speak, if there is to be voice identification. Since the privilege against self-incrimination does not protect a physical characteristic from disclosure, it is irrelevant whether or not that display involves a cooperative muscular movement on the part of the accused. Indeed, almost any display

[15] Any other rule would place an unwarranted premium on an offender's use of a mask. It would often effectively preclude any identification of an offender who wore a hood at the time of the offense, or who committed an offense involving use of a telephone, no matter how distinctive the offender's voice. See *Palmer* v. *Peyton*, 359 F. 2d 199 (C.A. 4); cf. *United States* v. *Moia*, 251 F. 2d 255 (C.A. 2). And it is clear that the voice contains "items which impress themselves sometimes on the perception and the memory more sharply than do the features or the garments." 3 Wigmore, *Evidence*, § 786a at p. 165 (3d ed. 1940).

of a physical characteristic—including standing, walking, and sitting—involves some active cooperation and muscular control, and "use of the vocal chords, when these are not employed to produce utterances of testimonial value, stands no differently from that of the arm muscles." *United States ex rel. Stovall* v. *Denno,* 355 F. 2d at 743 (dissenting opinion). If the requirement of active cooperation brought an accused's conduct within the protection of the Fifth Amendment, an accused could defeat almost any identification by sprawling face downward on the floor or clasping his hands to his face. It is not impermissible, we submit, to require an accused in custody to display at least those physical characteristics, such as appearance, gait, and speech, which are regularly exposed to public view. It would indeed be anomalous if the government were prohibited from calling upon an accused to speak a sentence, but were perfectly free to puncture his body and withdraw a blood sample. See *Schmerber* v. *California,* 384 U.S. 757.[16]

[16] This case does not involve a "re-enactment" of the crime, and we do not read the opinion of the court below (R. 46) as concluding that it did. Respondent and the other individuals in the lineup were directed to wear white tape on their faces (as the robber had) and to speak the words which the robber had uttered. This was the most fair procedure to test the witnesses' recollections since it focussed on precisely the physical characteristics which they had seen and heard at the time of the robbery. See 3 Wigmore, *Evidence,* § 786a(B)2(b), p. 164 (3d ed. 1940); Williams, *Identification Parades,* [1955] Crim. Law Rev. (Eng.) 525, 534, 536. The procedure used at the lineup was not suggestive to the witnesses in the sense that it focussed attention on respondent rather than on any of the other participants. Nor was there any "re-enactment" of the kind which might produce visible physiological reactions in a guilty suspect or otherwise induce admissions of guilt.

III

THE TESTIMONY OF WITNESSES WHO IDENTIFIED RESPONDENT IN OPEN COURT WAS ADMISSIBLE IRRESPECTIVE OF WHETHER RESPONDENT'S CONSTITUTIONAL RIGHTS WERE VIOLATED DURING THE LINEUP

Having found that respondent's Sixth Amendment rights had been violated at the lineup, the court below held that it was error for the trial judge to admit the identification testimony of the bank's employees, who had engaged in the pretrial identification. The court went far beyond the dissenters in *Stovall* (355 F. 2d at 743), who concluded only that it was impermissible for the prosecution affirmatively to introduce proof pertaining to the lineup; it held that since "it cannot be said with any certainty that [the witnesses] would have recognized [respondent] at the time of trial if this intervening lineup had not occurred" (R. 48), their trial identification of respondent was inadmissible.[17] Under this view, no matter how long or how clearly a witness observed a defendant during the commission of the offense, he would not be permitted to identify the offender in open court if he participated in an "improper" lineup before trial. This exclusionary rule is both unprecedented and unsound in principle.

1. The evidence which was held impermissible by the court below—the courtroom identification of re-

[17] We read the court's opinion as excluding only the identification portion of the bank employees' testimony, not the proof regarding the circumstances of the robbery. Under no conceivable set of facts, we submit, could the testimony concerning what the robber had said and done while in the bank have been colored by the lineup.

spondent as the offender—was not the product of the asserted constitutional violation. The witnesses and their potential testimony were known to the prosecution before the challenged lineup. Those witnesses' recollections of the appearance of the accused similarly antedated the lineup. Hence the courtroom identification was derived not from the assertedly invalid lineup but from an independent source—the conduct of the defendant and his observation by the witnesses at the time when the offense was committed.

As recently as *Hoffa* v. *United States,* No. 32, this Term, decided December 12, 1966, slip op. pp. 15–16, this Court re-affirmed the standard governing exclusion of evidence announced in *Wong Sun* v. *United States,* 371 U.S. 471, 488: that the critical question in deciding whether assertedly tainted evidence should be suppressed is "whether, granting establishment of the primary illegality, the evidence * * * has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." The court below determined that it could not "be said with any certainty" that the witnesses would have identified respondent at trial if not for the intervening lineup. But that does not mean that their trial testimony was "come at by exploitation" of the assertedly illegal identification. What the Court of Appeals for the Ninth Circuit said in *Gilbert* v. *United States,* No. 19,940, decided September 16, 1966, pending on writ of certiorari, No. 1011 Misc., this Term, slip op. p. 31, is fully applicable here:

> The courts have excluded that part of the testimony of a witness that describes what he saw

or heard on an occasion when his seeing or hearing was in violation of a constitutional right of the accused. See *Wong Sun* v. *United States,* 1963, 371 U.S. 471, 485. And under the "fruit of the poisonous tree" doctrine (*Nardone* v. *United States,* 1939, 308 U.S. 339, 341) other evidence obtained by means of the unconstitutional activity has also been excluded. But, as is pointed out in *Nardone,* "If knowledge of them [the facts] is gained from an independent source, they may be proved like any others." (P. 341.) Here, every witness who was at the lineup had knowledge gained from an independent source. Each had actually seen one of the robberies and had seen Gilbert participating in it. Each identified him in the courtroom. Each such identification necessarily harked back to what the witness saw at the scene of the crime. The accuracy of the recollection of the witness may or may not have been bolstered or shaken during the lineup proceeding. But surely the knowledge gained from the independent source, at the scene of the crime, remained. We reject the idea that the witnesses should not have been permitted to testify at all because they participated in the lineup.[18]

Indeed, the facts of record here demonstrate persuasively that the lineup identification could have had only a negligible effect on the witnesses' identification of respondent at trial. When the robber entered the bank, no customers were present. He approached

[18] In *Payne* v. *United States,* 294 F. 2d 723, certiorari denied, 368 U.S. 883, the Court of Appeals for the District of Colum-

Mrs. Chambers, who was standing behind the counter, and asked to cash a check (R. 10). He then drew a pistol, directed it at Mrs. Chambers, went behind the counter to where she was standing, handed her a pillow case, and told her to get the money (R. 11–12). She took the pillow case into the vault where Mr. Gary was there getting some papers (R. 12–13, 27–28). The robber stood in front of the doorway to the vault with his pistol trained on the two employees as they filled the pillow case with currency (R. 13–14, 27–28). After telling Gray that if he would follow directions no one would be hurt (R. 14, 29), the robber directed Gray to go to the teller's cage and put the rest of the currency in the bag (R. 14–15, 29). He then ordered Gray to return to the vault where Mrs. Chambers had remained, and to close the door behind him (R. 14, 16, 30). Witnesses Chambers and Gray both obviously had a full opportunity to observe the robber carefully, and that full observation is reflected in their testimony at trial. Mrs. Chambers was able to testify to the robber's general demeanor—outwardly calm when he first entered the bank but nervous during

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bia Circuit rejected the claim that a courtroom identification was tainted by an assertedly illegal lineup (294 F. 2d at 727):

> The consequence of accepting appellant's contention in the present situation would be that [the witness] would be forever precluded from testifying against Payne in court, merely because he had complied with the request of the police that he come to police headquarters and had there identified Payne as the robber. Such a result is unthinkable. The suppression of the testimony of the complaining witness is not the right way to control the conduct of the police, or to advance the administration of justice. The rights of the accused in a case like the present are adequately protected when the complaining witness takes the stand in open court, for examination and cross-examination.

the latter part of the robbery (R. 19). Both testified with particularity about his clothing (R. 11, 31), both described the tape on the sides of his face (R. 11, 30), and both noted that the pistol was nickle-plated (R. 11, 28). Both identified respondent as the robber (R. 12, 29), and Gray re-affirmed that there was no doubt in his mind that respondent was the person who had robbed him (R. 36). Mrs. Chambers also testified that between the time of the robbery and the time of the lineup, she had been shown several groups of pictures by various law-enforcement officers. She did not recognize any of the pictures until, on one occasion, she was shown respondent's photograph among a group of eight or nine, and she then picked it from the file (R. 20).[19] The above testimony shows, we submit, that the witnesses' recollection of the details of the offense was clear and that their independent recollections, not the lineup, led to their identification of respondent.[20]

2. If, contrary to our view, respondent's constitutional argument is sound, the most that could properly be excluded, we submit, would be affirmative use by the prosecution of the lineup identification. That is what was involved in the *Stovall* case, and it is all

[19] Although Mr. Gray had also been shown groups of photographs (R. 31), he was not asked at trial whether he had identified a photograph of respondent.

[20] The testimony also negates any support for the courts' apparent concern that the witnesses' glimpse of respondent in the hallway prior to the lineup may some way have influenced their identification. Additionally, there is no indication in the record that either witness assumed that respondent was in the F.B.I. agent's custody; Mrs. Chambers had not seen the agent in the hallway (R. 23), and Mr. Gray, although he had seen and recognized the agent, was not certain that the man standing near the agent was respondent (R. 32–34).

that the dissenters there sought to establish. The dissenters in *Stovall* said that "exclusion of the hospital identification * * * would simply have required the prosecutor to rest on [the victim's] memory of the night of the dreadful crime and on her courtroom identification." 355 F. 2d at 745. The course taken by the prosecution in the present case would, therefore, satisfy the standard of the dissenters in *Stovall*.

In the present case, the government did not rely affirmatively on testimony regarding the lineup identification nor did the prosecutor suggest—as he did in his opening argument in *Stovall* (355 F. 2d at 741 n. 3, 745)—that it would be part of the government case.[21] The circumstances of the lineup were pur-

[21] This case is not affected by the fact that, after the defense had first developed the facts of the lineup identification in cross-examination of Mrs. Chambers, the government attorney briefly touched upon the matter at the end of his direct examination of Mr. Gray (R. 30–31). As noted by Judge Friendly in the original opinion of the three-judge panel in *Stovall* (Record, No. 254, this Term, p. 28), "Normally there could be no valid claim of error if a defendant presented evidence which he could bar and the State followed with a then harmless repetition." There, however, where the defense had cross-examined two police officers concerning the hospital identification before the victim testified, the panel noted that (*id.* at 28–29):

> the prosecutor had unequivocally announced at the start of the trail that Mrs. Behrendt would testify to her earlier identification; in this context, defense counsel's attempt to discredit such evidence in advance, while the detectives were available for cross-examination, rather than having to recall them, cannot fairly be deemed an independent attempt to introduce the identification as part of Stovall's case. * * *

At respondent's trial, the lineup identification was introducted and developed solely as a part of the defense case.

posefully and deliberately elicited by defense counsel in his cross-examination of the bank's employees in an effort to attack the accuracy of their memories and to lay a foundation for final argument to the jury. Hence the disclosure of the lineup identification affords no basis for reversing respondent's conviction.[22]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be reversed and the judgment of conviction reinstated.

RALPH S. SPRITZER,
*Acting Solicitor General.**
FRED M. VINSON, JR.,
Assistant Attorney General.
NATHAN LEWIN,
Assistant to the Solicitor General.
BEATRICE ROSENBERG,
RONALD L. GAINER,
Attorneys.

DECEMBER 1966.

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[22] The court below, in assessing whether the lineup identification might have contributed to respondent's conviction, stated that "the only other testimony by which Wade was identified with the crime was the testimony of his alleged accomplices, who admitted at trial to inconsistent statements" (R. 48). The reference to "inconsistent statements" was apparently directed to the fact that Pickett and Briggs, before being sentenced for the robbery of a San Antonio bank, had denied complicity in any other robberies, although after sentencing each acknowledged his role in the Eustace bank robbery and in a bank robbery which had occured at Hawkins, Texas, as well (Tr. 98, 100–101, 178–179).

* In lieu of the Solicitor General, who has disqualified himself.

APPENDIX

STATE OF TEXAS

AFFIDAVIT

COUNTY OF SMITH

I, KENNETH R. ALBERT, being duly sworn, depose as follows:

This affidavit is given in answer to the brief submitted by Weldon G. Holcomb, Attorney at Law, Tyler, Texas, on behalf of his client, BILLY JOE WADE, particularly to Point I supported by its argument.

Concerning Point I supported by its argument, the following is submitted:

The attorney for the appellant BILLY JOE WADE stated KENNETH ALBERT, a Special Agent of the Federal Bureau of Investigation was a licensed attorney, which is entirely false, since I never attended law school.

Where the attorney for the appellant stated witnesses CHAMBERS and GRAY observed appellant in the hallway and in the anteroom on the second floor of the courthouse in custody of MR. ALBERT, on May 12, 1965, this is not true. I never had the appellant in my custody, as he was taken from his jail cell by the local Sheriff and Jailer and escorted by them to the courtroom for purpose of holding a lineup. While in the hallway and in the anteroom, I was never alone with appellant. In the hallway and anteroom, there were always officers present, who had appellant in custody. While in the anteroom, there

were also present six other inmates of the county jail, who participated in the lineup.

On April 26, 1965, appellant was interviewed at the Smith County Jail concerning his participation in the robbery of the First State Bank, Eustace, Texas, on September 21, 1964. At this time, appellant was advised by me of his rights at which time he requested an attorney prior to discussing this matter. The interview was then concluded and appellant made no admissions. His request was brought to the attention of Assistant U.S. Attorney H. Don Nicholson on April 26, 1965. Appellant was never interrogated at any time after this regarding his participation in the robbery of the First State Bank, Eustace, Texas, on September 21, 1964.

/s/ Kenneth R. Albert
KENNETH R. ALBERT
Special Agent
Federal Bureau of Investigation

SWORN to and SUBSCRIBED before me on this 19 day of November, 1965.

/s/ Mary M. King
Notary Public
Smith County, Texas

My Commission expires
June 1, 1967.

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No. 334

In the
Supreme Court of the United States
OCTOBER TERM, 1966

UNITED STATES OF AMERICA,
Petitioner,
v.
BILLY JOE WADE,
Respondent.

BRIEF FOR RESPONDENT

WELDON HOLCOMB,
Counsel for Respondent,
111-B N. Spring,
Tyler, Texas.

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No. 334

In the

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OCTOBER TERM, 1966

UNITED STATES OF AMERICA,

Petitioner,

v.

BILLY JOE WADE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT

OPINION BELOW

The opinion of the Court of Appeals (R. 44-49) is reported at 358 F. 2d 557.

JURISDICTION

The Judgment of the Court of Appeals was entered on March 31, 1966 (R. 50). A petition for rehearing en banc was denied on May 11, 1966 (R. 51). On June 15, 1966, Mr. Justice Black extended the time within which to file a petition for a Writ of Certiorari to and including July 11,

1966 (R. 52). The petition for a Writ of Certiorari was filed on July 11, 1966, and Certiorari was granted on October 10, 1966 (R. 53). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the fact that a lineup (at which Respondent and five or six other participants were asked to utter a specified sentence or sentences identical or very similar with that allegedly used by the robber) conducted after Indictment and without notification to Respondent's Counsel required exclusion of the courtroom identification of Respondent by the witnesses who had identified him at the lineup.

STATEMENT OF THE CASE

The following Statement of the Case by the Respondent with only slight variation is the Statement of the Case as stated by the Government in its Brief.

Respondent was convicted after a trial by jury, in the United States District Court for the Eastern District of Texas, under a two-count Indictment charging that he conspired to rob, and did rob, a federally insured bank in violation of 18 U.S.C. 371 and 2113(a) and (d) (R. 1-3). He was sentenced to imprisonment for five years on the conspiracy count and for fourteen years on the robbery count, the sentences to run concurrently (R. 42-43). The Court of Appeals reversed, one Judge dissenting (R. 44-50).

1. The evidence showed that a bank in Eustace, Texas, was robbed on September 21, 1964. While one man waited

outside in a parked automobile, another man, with strips of tape on each side of his face, entered the bank, aimed a pistol at Jean Chambers and Lee Gray, the bank's two employees, handed them a pillow case, and ordered them to fill it with currency. The employees complied. The robber then fled with his accomplice in a waiting car (R. 7-19, 27-31; Tr. 135-139, 188-189, 195).[1]

On March 23, 1965, an Indictment was returned charging Respondent and two others (named Pickett and Briggs) with conspiring to rob the Eustace bank, and charging Respondent and Briggs with executing the robbery (R. 1-3). Respondent was arrested on April 2, and on April 26 an Attorney was appointed to represent him (R. 5). On May 12, without notice to Respondent's appointed Counsel, Respondent was brought by the Federal Agent Kenneth Albert, whom both witnesses knew very well and being the same individual who had requested their presence in Tyler for the purpose of the lineup and identification. The Respondent was then observed alone or in company with F.B.I. Agent Kenneth Albert (Tr. 256). Shortly thereafter several other prisoners were brought down from the County Jail by local officers (Tr. 238). Some type of tape was placed upon the face of each of the members of the lineup. The Respondent and the other members of the lineup were not dressed alike. Respondent had been observed with Mr. Albert and the witness stated that the person whom he saw with the F.B.I. Agent "resembled" Respondent but could not say definitely that it was the same man.

[1] "Tr." refers to the typewritten transcript of the trial proceedings.

The prisoners, including the Respondent, were brought into the Courtroom and questioned and required to re-enact a portion of the crime (R. 44-49). Each was asked to repeat the phrase, "Put the money in this bag", or words of similar import. The two employees then identified the same man who had been observed in the custody of or in the presence of F.B.I. Agent Kenneth Albert (R. 24, 31 & 35).

2. At trial, after Respondent's two accomplices testified on behalf of the Government, Mrs. Chambers described the robbery in detail (R. 7-19) and identified Respondent as the man who had taken the money at gunpoint (R. 12). At the time of the robbery, she stated, he wore grey khaki pants, a long-sleeved sport shirt, and a straw hat. He had carried a nickel-plated gun and a pastel-striped pillow case, and had strips of tape affixed to his face (R. 11-12). On cross-examination, defense Counsel elicited the fact that after the robbery the witness had picked Respondent's picture out of a group of eight or nine photographs (R. 20). Defense Counsel also elicited, for the first time, the fact that Respondent had been identified by Mrs. Chambers at the lineup on May 12 (R. 22-25).

Gray also described the holdup of the bank (R. 27-31) and identified Respondent as the robber (R. 29). He stated that Respondent had worn grey khaki trousers, a long-sleeved sport shirt, and a broad-brimmed straw hat (R. 31), that he had carried a nickel-plated pistol (R. 28), and that he had a strip of tape on each cheek (R. 30). Just before the conclusion of the direct examination, Gray was questioned briefly concerning the lineup which had been revealed

in the cross-examination of Mrs. Chambers (R. 30-31). Gray's cross-examination related principally to the pre-lineup observation through the open door of Agent Albert and the man resembling Respondent (R. 32-35).

At the conclusion of the testimony, defense Counsel moved for a judgment of acquittal on the ground that Respondent's Fifth and Sixth Amendment rights were violated when the lineup was conducted without notice to Respondent's Attorney. Counsel also moved to strike the identification testimony of the two bank employees (R. 38-39). The motions were denied (R. 39).

3. The Court of Appeals, one Judge dissenting, reversed Respondent's conviction on the ground that the post-indictment lineup in the absence of Respondent's appointed Counsel violated Respondent's Sixth Amendment rights. The majority expressly adopted the view of the dissenting Judges in *United States* ex rel. *Stovall v. Denno*, 355 F. 2d 731 (2nd Cir. 1966), Certiorari granted, 384 U.S. 1000. The dissenters in *Stovall* believed that an indicted Defendant is entitled to the assistance of Counsel when the Government "wishes to make use of him to obtain evidence that will have independent testimonial value" (R. 47), whether or not the desired evidence is of the kind protected by the Fifth Amendment. The majority in this case said that, had Counsel been present, he could have instructed Respondent not to make the responses requested for purposes of voice identification, and that he could have prevented the situation whereby the bank employees saw Respondent before the lineup took place (R. 47-48). In the circumstances, the

majority found that the "illegal procedure" might well have prejudicially colored the bank employees' courtroom identification (R. 48-49). The majority concluded that reversal was required, and that in the event of a new trial "the evidence of the two bank witnesses, following the occurrence that we have held to have violated Wade's rights, must be omitted" (R. 49).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case, together with *Gilbert v. California*, No. 223, this Term, and *Stovall v. Denno*, No. 254, this Term, present the question whether the clause of the Sixth Amendment which guarantees to an accused in a criminal prosecution "the assistance of Counsel for his defense" requires that a Defendant's Attorney be given notice and an opportunity to be present at a witness' pretrial identification of the Defendant.

Our basic position is contrary to that of the Government in that it is the firm opinion and position of the writer that at anytime after the investigative process has become accusatory and focalized upon the Defendant that the Defendant has without a doubt, guaranteed by the Constitution of the United States of America, the right to have Counsel, either retained or appointed, present with him to protect those rights. We cannot agree with the Government's position that a lineup where a Defendant is required to utter specified words or sentences identical with or similar to that allegedly made by the malefactor is not a stage of the proceedings and does not require the presence of Defendant's

Attorney. Such a lineup cannot be anything other than a part of the net of evidence which the Government or the investigating officers are attempting to weave around that individual who is no longer a suspect but one charged and Indicted for the crime.

The Government states "whether it (lineup) occurs before or after Indictment, identification is not a stage of the adversary process by which guilt or innocence is determined". This statement appears to this writer to be totally inadequate in that what investigator would hesitate to admit that if the eye witnesses to the crime had failed to identify the accused that in all probability no further action against the accused would have been held. The writer respectfully urges that an accused is entitled at all times, especially after the appointment of his Counsel, to have Counsel present with him at any investigatory proceeding where portions of the crime being investigated are to be re-enacted. It is also deemed relevant by the writer that even Congress has recognized the importance of Counsel being present. The Criminal Justice Act of 1964 states in sub-paragraph (c): "A Defendant for whom Counsel is appointed shall be required at every stage of the proceedings from his initial appearance before the United States Commissioner or Court through appeal. * * *" 18 U.S.C. 3006A. The same requirement has been incorporated in Rule 44(a) of the Federal Rules of Criminal Procedure.

The Government's position that Counsel has no Attorney's function to perform at a pretrial identification to the writer appears to be faulty. The Government states "the law enforce-

ment officials who have the accused in custody would not be obliged to heed his suggestions regarding lineup procedures". This statement in all probability is correct. Nevertheless presence of Counsel for the Defendant would insure that Defendant had the benefit of Counsel to assist him in his activities to prevent him through ignorance or otherwise from waiving any Constitutional guarantees which he might possess at such lineup and with which Counsel is obligated to protect.

The Government further states that "no Constitutional rights are jeopardized by a pretrial identification (as contrasted with an interrogation)." The writer fails to see how the Government can justify such a statement when it is admitted by the Government that in the instant case questions were asked and answers were solicited including parts of the crime and re-enactment of the same in the presence of witnesses who, by their own testimony, stated that they or each of them had never seen the person who robbed the bank before such robbery, were not acquainted with the robber and were brought to Tyler for the purpose of identifying the person charged by the Government as being the robber; such lineup occurred approximately six months after the commission of the crime.

It is the position of the writer that the lineup in this case violated the Fifth Amendment privilege against self-incrimination. Respondent was asked to provide evidence "of a testimonial or communicative nature". In this writer's opinion such was contrary to *Schmerber v. California*, 384 U.S. 757 (1966) and contrary to the position taken by the

Government on this point. Observation of appearance and physical characteristics possibly infringed no Constitutional privilege. However, in asking the Respondent to speak a prescribed sentence (a re-enactment of a part of the crime), the Government was compelling a testimonial disclosure. If in fact all that the Government had desired to obtain from the subject was a display of the sound of his voice, quite possibly they could have requested the Respondent to read portions of the Constitution, some novel, or a local newspaper but such was not the case. The Government obtained from the Respondent a re-enactment of a portion of the crime, placing him in a lineup with other individuals, placing tape upon his face and requiring statements identical or similar to the statements made by the robber. However, the Government was not nearly so careful in seeing that the Respondent was not observed by the witnesses alone prior to the lineup or seeing that the Respondent and others in the lineup were dressed similar to the robber nor seeing that all the members of the lineup wore broad-brimmed western hats (R. 31). On the contrary, as the writer understands the testimony Respondent was seen alone with the F.B.I. Agent Albert; pictures of the Respondent had been shown to the witness, presumably by Mr. Albert, who, from the testimony was handling the investigation and preparation of the case for the Government at the essential times in question; Mr. Albert was the initiating party at the lineup and it was he who asked the questions and received the responses and as a result obtained the improper identification of the Respondent.

The writer is in complete agreement with the majority opinion of the Fifth Circuit written by Judge Tuttle which requires the exclusion of the improperly obtained identification and urges this Court to adopt the rationale of the Fifth Circuit in this cause. Unless this Court adopts such opinion, then there is no consequence to any improper activity of this nature by the officers of the Government for the reason that if this Court allows the identification testimony of the witnesses as being legitimate, then the Defendant would be stripped of the benefits of the rights guaranteed him in this matter. Therefore, it is urged that the majority opinion of the Fifth Circuit in this cause be adopted by this Court and that the cause be remanded for another trial not inconsistent with the opinion rendered by the Fifth Circuit.

ARGUMENT

I.

PRETRIAL IDENTIFICATION OF AN ACCUSED IS A STAGE OF THE CRIMINAL PROCEEDINGS WITHIN THE ASSISTANCE-OF-COUNSEL GUARANTEE OF THE SIXTH AMENDMENT

This Court's decisions have clearly shown that an individual accused of felony charges is Constitutionally entitled to the assistance of Counsel at every "critical stage in a criminal proceeding". *Hamilton v. Alabama*, 368 U.S. 52 (1961); *White v. Maryland*, 373 U.S. 59 (1963); *Massiah v. United States*, 377 U.S. 201 (1964). Accordingly the Court below deemed this Constitutional rule applicable in the instant case and from the facts presented properly determined that the Government's agents "deprived him of the aid of Counsel at a

critical stage of the prosecution" (R. 47)—i.e. the activities surrounding the lineup where the accused, already under Indictment, was required to participate in a lineup and re-enact a portion of the crime being investigated in the presence of witnesses after having been observed alone with the Federal Agent. The Government contends in its Brief (p. 11) "Pretrial identification is not, in any theoretical or practical sense, a part of the formal adversary proceeding in which Respondent's guilt or innocence is determined". The writer frankly admits that at such pretrial identification mentioned by the Government there was no Judge present, there was no jury present, there was no Court Reporter present. Such activity was not held in open Court (however the lineup was held in the Courtroom in the Courthouse so as to in a sense imply authenticity, truth and correctness). The accused, of course, was there in custody and pointedly questioned, according to the record and opinion of the Court below, and required to re-enact a part of the crime. As a result, witnesses Gray and Chambers identified the accused. The writer respectfully submits that such activity was and is a vital part of the prosecution and an integral part of the adversary process and that Counsel for the accused should have been present, especially in the instant case for the reason that Counsel had already been appointed, had had contact with the accused and the Government's employees had been so advised by copies of the letter of appointment having been filed with the United States Clerk, the United States Attorney and the United States Marshal's Office. Thus Counsel's presence would not only be appropriate but should be required. The illustrations given by the Government, such as

ballistics examination, fingerprint examination, footprint examination do not apply in this instance for among other reasons the footprints examined by the use of casts, photographs, etc. could likewise be adequately examined by representatives of the accused at a later time. Fingerprints could be examined at a later time and compared. Handwriting could be examined at a later time. However, in this instance the only matter which can be examined at a later time by Counsel for the accused or the accused's witnesses is the memory of the Government's witnesses and the Government's agents as to what actually transpired at such lineup. This Court is well aware of the faultiness of human memory and the unconscious attempt by a normal human being to justify and sustain any of his actions which might be questioned. No reflection upon the integrity of the Government's agents or its witnesses is intended, but Counsel for the accused respectfully submits that the Government's agent in all probability informed the witnesses that he had the "man" and that he wanted them, the witnesses, to identify the accused. That the witnesses were brought to the Smith County Courthouse, where from a partial reconstruction of the occurrences, we find the accused with the Government agent alone. Then at a later time other prisoners are available with the accused. The accused is then required to reenact a part of the crime and then follows the identification.

The writer respectfully submits that such activity of the Government cannot be re-examined by defense Counsel at leisure without error or under the same circumstances as

could a set of fingerprints, a set of footprints, a blood test, or handwriting specimen and that the activity of the Government's agents and its witnesses and the product—identification—should not be allowed for the reason that such was obtained in violation of the Constitutional rights of the accused.

The Government also states in its Brief (p. 13) "Pretrial identification through a lineup or by a confrontation between an accused and a victim or witness (in which the accused is not interrogated or otherwise requested to make testimonial disclosures) is, in essence, part of the prosecution's interview of the witness". This statement may, for the purpose of argument, be correct. However, it has no application in this case for, as is shown by the testimony of the witnesses Gray and Chambers and in the opinion of the Court below, the accused was required to re-enact or utter a part of the crime without the "guiding hand of Counsel". See *Powell v. Alabama*, 287 U.S. 45 (1932). Thus the obvious violation of Respondent's Constitutional rights dictates the inadmissibility of the tainted identification at the trial.

The Government makes a very illuminating statement in its' Brief: "Observation of the accused when he is unaccompanied in a less reliable indicator of the witness accuracy or probity". (p. 14) Such statement is a part of the accused's contentions in this instance because of the pre-lineup observation by the witnesses of the accused in the company of the Federal Agent whom the witnesses knew. This pre-lineup observation followed immediately thereafter by the lineup in which the individual seen in the isolated presence of the

known Government officer is required to re-enact a part of the crime would necessarily influence the opinion of the witnesses in identifying the accused. The admitted unreliability of such observation confirms the contention of the accused that his Constitutional rights were violated.

II.

THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION IS VIOLATED WHEN THE ACCUSED IS REQUIRED TO RE-ENACT A PART OF THE CRIME WHEN HE IS SUBJECTED TO PRETRIAL IDENTIFICATION WHILE IN CUSTODY (BEING REQUIRED TO UTTER STATEMENTS IDENTICAL OR SIMILAR TO THAT ATTRIBUTED TO THE MALEFACTOR)

It is the opinion of the writer that the Government is in error in its contention that the Fifth Amendment privilege against self-incrimination is not violated in the circumstances attendant at this cause.

In the instant case the accused was required, according to the record, to utter a prescribed sentence identical or very similar to that attributed to the robber. Thus, in the opinion of the writer, we cannot escape the conclusion that the accused was being required to testify against himself.

The writer would request the Court to visualize the lineup in question and the writer feels that the Court can very easily see that the accused had already been Indicted; already had Counsel appointed; had already been photographed in all probability; that the witnesses were brought from a distance for the specific purpose of identifying the man whom the Government had Indicted for the offense upon the statements of two admitted liars, being Briggs and Pickett; that

the accused was in the custody of the F.B.I. Agent Albert, and in spite of the Affidavit made by the F.B.I. Agent, was observed alone with the F.B.I. Agent in the absence of other prisoners; that the lineup was then held and the inquisitor at the lineup was none other than the F.B.I. Agent Albert, who had summoned the witnesses to the lineup; had told them the express purpose of the lineup; and the inquisitor proceeded to ask the questions; received the answers; and in all probability being of the opinion himself that the accused was guilty, either consciously or unconsciously, focalized his attention upon the accused.

Under the above circumstances, who is able to reasonably say that the identification of the witness was not prompted by the testimonial disclosures made by the accused when being interrogated by the F.B.I. Agent in the absence of Counsel.

Thus, it is the opinion of the writer that the majority opinion of the Circuit Court should be adopted in this cause.

III.

THE TESTIMONY OF WITNESSES WHO IDENTIFIED RESPONDENT IN OPEN COURT WAS NOT ADMISSIBLE BECAUSE RESPONDENT'S CONSTITUTIONAL RIGHTS WERE VIOLATED DURING THE LINEUP.

The government's contention that the testimony and identification of the witnesses should be available regardless of unconstitutional activity by the officers to this writer is unsound.

It is the opinion of the writer that if this Court adopts the contention of the Government the protections of the

Constitution available to an accused would become worthless because the Constitutional rights of an individual such as Respondent, to the assistance of Counsel and to not be a witness against himself could be violated with impunity, consciously or unconsciously, by the Government and there would be no consequence to such violations.

The writer respectfully urges this Court by its opinion to inform officers, be they local, State or Federal, that the fruits of unconstitutional activity will not be tolerated nor allowed to benefit those responsible for such violations.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

WELDON HOLCOMB,
Attorney for Respondent by Appointment.

January, 1967

SUPREME COURT OF THE UNITED STATES

No. 334.—October Term, 1966.

United States, Petitioner, v. Billy Joe Wade. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June 12, 1967.]

Mr. Justice Brennan delivered the opinion of the Court.

The question here is whether courtroom identifications of an accused at trial are to be excluded from evidence because the accused was exhibited to the witnesses before trial at a post-indictment lineup conducted for identification purposes without notice to and in the absence of the accused's appointed counsel.

The federally insured bank in Eustace, Texas, was robbed on September 21, 1964. A man with a small strip of tape on each side of his face entered the bank, pointed a pistol at the female cashier and the vice president, the only persons in the bank at the time, and forced them to fill a pillowcase with the bank's money. The man then drove away with an accomplice waiting in a stolen car outside the bank. On March 23, 1965, an indictment was returned against respondent Wade and two others for conspiring to rob the bank, and against Wade and the accomplice for the robbery itself. Wade was arrested on April 2, and counsel was appointed to represent him on April 26. Fifteen days later an FBI agent, without notice to Wade's lawyer, arranged to have the two bank employees observe a lineup made up of Wade and five or six other prisoners and conducted in a courtroom of the local county courthouse. Each person in the line wore strips of tape such as allegedly worn by the robber and upon direction each said something like "put the money in the bag," the words allegedly

uttered by the robber. Both bank employees identified Wade in the lineup as the bank robber.

At trial, the two employees, when asked on direct examination if the robber was in the courtroom, pointed to Wade. The prior lineup identification was then elicited from both employees on cross-examination. At the close of testimony, Wade's counsel moved for a judgment of acquittal or, alternatively, to strike the bank officials' courtroom identifications on the ground that conduct of the lineup, without notice to and in the absence of his appointed counsel, violated his Fifth Amendment privilege against self-incrimination and his Sixth Amendment right to the assistance of counsel. The motion was denied, and Wade was convicted. The Court of Appeals for the Fifth Circuit reversed the conviction and ordered a new trial at which the in-court identification evidence was to be excluded, holding that, though the lineup did not violate Wade's Fifth Amendment rights, "the lineup, held as it was, in the absence of counsel, already chosen to represent appellant, was a violation of his Sixth Amendment rights . . . ." 358 F. 2d 557, 560. We granted certiorari, 385 U. S. 811, and set the case for oral argument with No. 223, *Gilbert* v. *California*, *post*, and No. 254, *Stovall* v. *Denno*, *post*, which present similar questions. We reverse the judgment of the Court of Appeals and remand to that court with direction to enter a new judgment vacating the conviction and remanding the case to the District Court for further proceedings consistent with this opinion.

I.

Neither the lineup itself nor anything shown by this record that Wade was required to do in the lineup violated his privilege against self-incrimination. We have only recently reaffirmed that the privilege "protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a

testimonial or communicative nature . . . ." *Schmerber* v. *California,* 384 U. S. 757, 761. We there held that compelling a suspect to submit to a withdrawal of a sample of his blood for analysis for alcohol content and the admission in evidence of the analysis report was not compulsion to those ends. That holding was supported by the opinion in *Holt* v. *United States,* 218 U. S. 245, in which case a question arose as to whether a blouse belonged to the defendant. A witness testified at trial that the defendant put on the blouse and it had fit him. The defendant argued that the admission of the testimony was error because compelling him to put on the blouse was a violation of his privilege. The Court rejected the claim as "an extravagant extension of the Fifth Amendment," Mr. Justice Holmes saying for the Court:

> "[T]he prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material." 218 U. S., at 252–253.

The Court in *Holt,* however, put aside any constitutional questions which might be involved in compelling an accused, as here, to exhibit himself before victims of or witnesses to an alleged crime; the Court stated, "[w]e need not now consider how far a court would go in compelling a man to exhibit himself." *Id.,* at 253.[1]

We have no doubt that compelling the accused merely to exhibit his person for observation by a prosecution

[1] *Holt* was decided before *Weeks* v. *United States,* 232 U. S. 383, fashioned the rule excluding illegally obtained evidence in a federal prosecution. The Court therefore followed *Adams* v. *New York,* 192 U. S. 585, in holding that, in any event, "[w]hen he is exhibited, whether voluntarily or by order, and even if the order goes too far, the evidence, if material, is competent." 218 U. S., at 253.

witness prior to trial involves no compulsion of the accused to give evidence having testimonial significance. It is compulsion of the accused to exhibit his physical characteristics, not compulsion to disclose any knowledge he might have. It is no different from compelling Schmerber to provide a blood sample or Holt to wear the blouse, and, as in those instances, is not within the cover of the privilege. Similarly, compelling Wade to speak within hearing distance of the witnesses, even to utter words purportedly uttered by the robber, was not compulsion to utter statements of a "testimonial" nature; he was required to use his voice as an identifying physical characteristic, not to speak his guilt. We held in *Schmerber, supra,* at 761, that the distinction to be drawn under the Fifth Amendment privilege against self-incrimination is one between an accused's "communications" in whatever form, vocal or physical, and "compulsion which makes a suspect or accused the source of 'real or physical evidence,'" *Schmerber, supra,* at 764. We recognized that "both federal and state courts have usually held that . . . [the privilege] offers no protection against compulsion to submit to fingerprinting, photography, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture." *Id.*, at 764. None of these activities becomes testimonial within the scope of the privilege because required of the accused in a pretrial lineup.

Moreover, it deserves emphasis that this case presents no question of the admissibility in evidence of anything Wade said or did at the lineup which implicates his privilege. The Government offered no such evidence as part of its case, and what came out about the lineup proceedings on Wade's cross-examination of the bank employees involved no violation of Wade's privilege.

II.

The fact that the lineup involved no violation of Wade's privilege against self-incrimination does not, however, dispose of his contention that the court room identifications should have been excluded because the lineup was conducted without notice to and in the absence of his counsel. Our rejection of the right to counsel claim in *Schmerber* rested on our conclusion in that case that "no issue of counsel's ability to assist petitioner in respect of any rights he did possess is presented." 384 U. S., at 766. In contrast, in this case it is urged that the assistance of counsel at the lineup was indispensable to protect Wade's most basic right as a criminal defendant—his right to a fair trial at which the witnesses against him might be meaningfully cross-examined.

The Framers of the Bill of Rights envisaged a broader role for counsel than under the practice then prevailing in England of merely advising his client in "matters of law," and eschewing any responsibility for "matters of fact." [2] The constitutions in at least 11 of the 13 States expressly or impliedly abolished this distinction. *Powell* v. *Alabama*, 287 U. S. 45, 60–65; Note 73 Yale L. J. 1000, 1030–1033 (1964). "Though the colonial provisions about counsel were in accord on few things, they agreed on the necessity of abolishing the facts-law distinction; the colonists appreciated that if a defendant were forced to stand alone against the State, his case was foredoomed." 73 Yale L. J., *supra*, at 1033–1034. This background is reflected in the scope given by our decisions to the Sixth Amendment's guarantee to an accused of the assistance of counsel for his defense. When the Bill of Rights was adopted, there were no organized police forces

[2] See *Powell* v. *Alabama*, 287 U. S. 45, 60–65; Beaney, Right to Counsel 8–26.

as we know them today.[3] The accused confronted the prosecutor and the witnesses against him, and the evidence was marshalled, largely at the trial itself. In contrast, today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality. In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment guarantee to apply to "critical" stages of the proceedings. The guarantee reads: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel *for his defence.*" The plain wording of this guarantee thus encompasses counsel's assistance whenever necessary to assure a meaningful "defence."

As early as *Powell* v. *Alabama, supra,* we recognized that the period from arraignment to trial was "perhaps the most critical period of the proceedings . . . ," *id.*, at 57, during which the accused "requires the guiding hand of counsel . . . ," *id.*, at 69, if the guarantee is not to prove an empty right. That principle has since been applied to require the assistance of counsel at the type of arraignment, for example, that provided by Alabama, where certain rights might be sacrificed or lost: "What happens there may affect the whole trial. Available defenses may be irretrievably lost, if not, then and there asserted, . . ." *Hamilton* v. *Alabama,* 368 U. S. 52, 54. See *White* v. *Maryland,* 373 U. S. 59. The principle was also applied in *Massiah* v. *United States,* 377 U. S. 201, where we held that incriminating statements of the defendant should have been excluded from evidence when it appeared that they were overheard by federal

[3] See Note, 73 Yale L. J. 1000, 1040–1042 (1964); Note, 53 Calif. L. Rev. 337, 347–348 (1965).

agents who, without notice to the defendant's lawyer, arranged a meeting between the defendant and an accomplice turned informant. We said, quoting the concurring opinion in *Spano* v. *New York*, 360 U. S. 315, 326, that "anything less . . . might deny a defendant 'effective representation by counsel at the only stage when legal aid and advice would help them.'" 377 U. S., at 204.

In *Escobedo* v. *Illinois*, 378 U. S. 478, we drew upon the rationale of *Hamilton* and *Massiah* in holding that the right to counsel was guaranteed at the point where the accused, prior to arraignment, was subjected to secret interrogation despite repeated requests to see his lawyer. We again noted the necessity of counsel's presence if the accused were to have a fair opportunity to present a defense at the trial itself:

> "The rule sought by the state here, however, would make the trial no more than an appeal from the interrogation; and the 'right to use counsel at the formal trial [would be] a very hollow thing [if], for all practical purposes, the conviction is already assured by pretrial examination' . . . . 'One can imagine a cynical prosecutor saying: Let them have the most illustrious counsel, now. They can't escape the noose. There is nothing counsel can do for them at the trial.'" 378 U. S., at 487–488.

Finally in *Miranda* v. *Arizona*, 384 U. S. 436, the rules established for custodial interrogation included the right to the presence of counsel. The result was rested on our finding that this and the other rules were necessary to safeguard the privilege against self-incrimination from being jeopardized by such interrogation.

Of course, nothing decided or said in the opinions in the cited cases links the right to counsel only to protection of Fifth Amendment rights. Rather those deci-

sions "no more than reflect a constitutional principle established as long ago as *Powell* v. *Alabama* . . . ." *Massiah* v. *United States, supra,* at 205. It is central to that principle that in addition to counsel's presence at trial,[4] the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate the accused's right to a fair trial.[5] The security of that right is as much the aim of the right to counsel as it is of the other guarantees of the Sixth Amendment—the right of the accused to a speedy and public trial by an impartial jury, his right to be informed of the nature and cause of the accusation, and his right to be confronted with the witnesses against him and to have compulsory process for obtaining witnesses in his favor. The presence of counsel at such critical confrontations, as at the trial itself, operates to assure that the accused's interests will be protected consistently with our adversary theory of criminal prosecution. Cf. *Pointer* v. *Texas,* 380 U. S. 400.

In sum, the principle of *Powell* v. *Alabama* and succeeding cases requires that we scrutinize *any* pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself. It calls upon us to analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice.

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[4] See, *e. g., Powell* v. *Alabama,* 287 U. S. 45; *Hamilton* v. *Alabama,* 368 U. S. 52; *White* v. *Maryland,* 373 U. S. 59; *Escobedo* v. *Illinois,* 378 U. S. 478; *Massiah* v. *United States,* 377 U. S. 201.

[5] See cases cited note 4, *supra; Avery* v. *Alabama,* 308 U. S. 444, 446.

III.

The Government characterizes the lineup as a mere preparatory step in the gathering of the prosecution's evidence, not different—for Sixth Amendment purposes—from various other preparatory steps, such as systematized or scientific analyses of the accused's fingerprints, blood sample, clothing, hair, and the like. We think there are differences which preclude such stages being characterized as critical stages at which the accused has the right to the presence of his counsel. Knowledge of the techniques of science and technology is sufficiently available, and the variables in techniques few enough, that the accused has the opportunity for a meaningful confrontation of the Government's case at trial through the ordinary processes of cross-examination of the Government's expert witnesses and the presentation of the evidence of his own experts. The denial of a right to have his counsel present at such analyses does not therefore violate the Sixth Amendment; they are not critical stages since there is minimal risk that his counsel's absence at such stages might derogate his right to a fair trial.

IV.

But the confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial. The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.[6] Mr. Justice Frankfurter once

[6] Borchard, Convicting the Innocent; Frank & Frank, Not Guilty; Wall, Eyewitness Identification in Criminal Cases; 3 Wigmore, Evidence § 786 (a) (3d ed. 1940); Rolph, Personal Identity; Gross, Criminal Investigation 47–54 (Jackson ed. 1962); Williams, Proof

said: "What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent—not due to the brutalities of ancient criminal procedure." The Case of Sacco and Vanzetti 30 (1927). A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification. A commentator has observed that "the influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor—perhaps it is responsible for more such errors than all other factors combined." Wall, Eyewitness Identification in Criminal Cases 26. Suggestion can be created intentionally or unintentionally in many subtle ways.[7] And the dangers for the suspect are particularly grave when the witness' opportunity for observation was insubstantial, and thus his susceptibility to suggestion the greatest.

Moreover, "it is a matter of common experience that, once a witness has picked out the accused at the line-up,

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of Guilt 83–98 (1952); Wills, Circumstantial Evidence 192–205 (7th ed. 1937); Wigmore, The Science of Judicial Proof §§ 250–253.

[7] See Wall, *supra*, note 6, 26–65; Murray, The Criminal Lineup at home and Abroad, 1966 Utah L. Rev. 610; Napley, Problems of Effecting the Presentation of the Case for a Defendant, 66 Col. L. Rev. 94, 98–99 (1966); Williams, Identification Parades, [1955] Crim. L. Rev. (Eng.) 525; Paul, Identification of Accused Persons, 12 Aust. L. J. 42 (1938); Houts, From Evidence to Proof 25; Williams & Hammelmann, Identification Parades, Parts I & II, [1963] Crim. L. Rev. 479–490, 545–555; Gorphe, Showing Prisoners to Witnesses for Identification, 1 Am. J. Police Sci. 79 (1930); Wigmore, The Science of Judicial Proof, *supra*, n. 6, at § 253; Devlin, The Criminal Prosecution in England 70; Williams, Proof of Guilt, 95–97.

he is not likely to go back on his word later on, so that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then, before the trial." [8]

The pretrial confrontation for purpose of identification may take the form of a lineup, also known as an "identification parade" or "showup," as in the present case, or presentation of the suspect alone to the witness, as in *Stovall* v. *Denno*, *post*. It is obvious that risks of suggestion attend either form of confrontation and increase the dangers inhering in eyewitness identification.[9] But as is the case with secret interrogations, there is serious difficulty in depicting what transpires at lineups and other forms of identification confrontations. "Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on . . . ." *Miranda* v. *Arizona*, *supra*, at 448. For the same reasons, the defense can seldom reconstruct the manner and mode of lineup identification for judge or jury at trial. Those participating in a lineup with the accused may often be police officers;[10] in any event, the participants' names are rarely recorded or divulged at trial.[11] The impediments to an objective observation are increased when the victim is the witness. Lineups are prevalent in rape and robbery prosecutions and present a particular hazard that a victim's understandable outrage may excite venge-

[8] Williams & Hammelmann, Identification Parades, Part I, [1963] Crim. L. Rev. 479, 482.

[9] Williams & Hammelmann, Identification Parades, Part I, *supra*, n. 8.

[10] See Wall., *supra*, n. 6, 57–59; see, *e. g.*, *People* v. *Boney*, 28 Ill. 2d 505, 192 N. E. 2d 920 (1963); *People* v. *James*, 218 Cal. App. 2d 166, 32 Cal. Rptr. 283 (1963).

[11] See Rolph, Personal Identity 50: "The bright burden of identity, at these parades, is exacted from the innocent participants to hover about the suspects, leaving the rest featureless and unknown and without interest."

ful or spiteful motives.[12] In any event, neither witnesses nor lineup participants are apt to be alert for conditions prejudicial to the suspect. And if they were, it would likely be of scant benefit to the suspect since neither witnesses nor lineup participants are likely to be schooled in the detection of suggestive influences.[13] Improper influences may go undetected by a suspect, guilty or not, who experiences the emotional tension which we might expect in one being confronted with potential accusers.[14] Even when he does observe abuse, if he has a criminal record he may be reluctant to take the stand and open up the admission of prior convictions. Moreover, any protestations by the suspect of the fairness of the lineup made at trial are likely to be in vain; [15] the jury's choice

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[12] See Williams & Hammelmann, Identification Parades, Part II, [1963] Crim. L. Rev. 545, 546; Borchard, Convicting the Innocent, 367.

[13] An additional impediment to the detection of such influences by participants, including the suspect, is the physical conditions often surrounding the conduct of the lineup. In many, lights shine on the stage in such a way that the suspect cannot see the witness. See *Gilbert* v. *United States*, 366 F. 2d 923 (C. A. 9th Cir. 1966). In some a one-way mirror is used and what is said on the witness' side cannot be heard. See *Rigney* v. *Hendrick*, 355 F. 2d 710, 711, n. 2 (C. A. 3d Cir. 1965); *Aaron* v. *State*, 273 Ala. 337, 139 So. 2d 309 (1961).

[14] Williams & Hammelmann, Part I, *supra*, n. 8, at 489; *Napley*, *supra*, n. 8, at 99.

[15] See *In re Groban*, 352 U. S. 330, 340 (BLACK, J., dissenting). The difficult position of defendants in attempting to protest the manner of pretrial identification is illustrated by the many state court cases in which contentions of blatant abuse rested on their unsupportable allegations, usually controverted by the police officers present. See, *e. g.*, *People* v. *Shields*, 70 Cal. App. 2d 628, 634–635, 161 P. 2d 475, 478–479 (1945); *People* v. *Hicks*, 22 Ill. 2d 364, 176 N. E. 2d 810 (1961); *State* v. *Hill*, 193 Kan. 512, 394 P. 2d 106 (1964); *Redmon* v. *Commonwealth*, 321 S. W. 2d 397 (Ky. Ct. App. 1959); *Lubinski* v. *State*, 180 Md. 1, 8, 22 A. 2d 455, 459 (1941). For a striking case in which hardly anyone agreed upon what oc-

is between the accused's unsupported version and that of the police officers present.[16] In short, the accused's inability effectively to reconstruct at trial any unfairness that occurred at the lineup may deprive him of his only opportunity meaningfully to attack the credibility of the witness' courtroom identification.

What facts have been disclosed in specific cases about the conduct of pretrial confrontations for identification illustrate both the potential for substantial prejudice to the accused at that stage and the need for its revelation at trial. A commentator provides some striking examples:

> "In a Canadian case . . . the defendant had been picked out of a line-up of six men, of which he was the only Oriental. In other cases, a blackhaired suspect was placed upon a group of light-haired

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curred at the lineup, including who identified whom, see *Johnson* v. *State*, 237 Md. 283, 206 A. 2d 138 (1965).

[16] An instructive example of the defendant's predicament may be found in *Proctor* v. *State*, 223 Md. 394, 164 A. 2d 708 (1960). A prior indentification is admissible in Maryland only under the salutary rule that it cannot have been made "under conditions of unfairness or unreliability." *Id.*, at 401, 164 A. 2d, at 712. Against the defendant's contention that these conditions had not been met, the Court stated:

"In the instant case, there are no such facts as, in our judgment, would call for a finding that the identification . . . was made under conditions of unfairness or unreliability. The relatively large number of persons put into the room together for [the victim] to look at is one circumstance indicating fairness, and the fact that the police officer was unable to remember the appearances of the others and could not recall if they had physical characteristics similar to [the defendant's] or not is at least suggestive that they were not of any one type or that they all differed markedly in looks from the defendant. There is no evidence that the Police Sergeant gave the complaining witness any indication as to which of the thirteen men was the defendant; the Sergeant's testimony is simply that he asked [the victim] if he could identify [the defendant] after having put the thirteen men in the courtroom."

> persons, tall suspects have been made to stand with short non-suspects, and, in a case where the perpetrator of the crime was known to be a youth, a suspect under twenty was placed in a lineup with five other persons, all of whom were forty or over." [17]

Similarly state reports, in the course of describing prior identifications admitted as evidence of guilt, reveal numerous instances of suggestive procedures, for example, that all in the lineup but the suspect were known to the identifying witness,[18] that the other participants in a lineup were grossly dissimilar in appearance from the suspect,[19] that only the suspect was required to wear distinctive clothing which the culprit allegedly wore,[20] that the witness is told by the police that they have caught the culprit after which the defendant is brought before the witness alone or is viewed in jail,[21] that the

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[17] Wall, Eyewitness Identification in Criminal Cases 53. For other such examples see Houts, From Evidence to Proof 25; Frankfurter, The Case of Sacco and Vanzetti, 12–14, 30–32; 3 Wigmore, Evidence § 786 (a), at 164, n. 2; Paul, Identification of Accused Persons, 12 Aust. L. J. 42, 44 (1938); Rolph, Personal Identity, 34–43.

[18] See *People* v. *James*, 218 Cal. App. 2d 166, 170–171, 32 Cal. Rptr. 283, 286 (1963); *People* v. *Boney*, 28 Ill. 2d 505, 192 N. E. 2d 920 (1963).

[19] See *Fredrickson* v. *United States*, 105 U. S. App. D. C. 262, 266 F. 2d 463 (C. A. D. C. Cir. 1959); *People* v. *Adell*, 75 Ill. App. 2d 385, 221 N. E. 2d 72 (1966); *State* v. *Hill*, 193 Kan. 512, 394 P. 2d 106 (1964); *People* v. *Seppi*, 221 N. Y. 62, 116 N. E. 793 (1917); *State* v. *Duggan*, 215 Ore. 151, 162, 333 P. 2d 907, 912 (1958).

[20] See *People* v. *Crenshaw*, 15 Ill. 2d 458, 460, 155 N. E. 2d 599, 602 (1959); *Presley* v. *State*, 224 Md. 550, 168 A. 2d 510 (1961); *State* v. *Ramirez*, 76 N. M. 72, 412 P. 2d 246 (1966); *State* v. *Bazemore*, 193 N. C. 336, 137 S. E. 172 (1927); *Barrett* v. *State*, 190 Tenn. 366, 229 S. W. 2d 516 (1950).

[21] See *Aaron* v. *State*, 273 Ala. 337, 139 So. 2d 309 (1961); *Bishop* v. *State*, 236 Ark. 12, 364 S. W. 2d 676 (1963); *People* v. *Thompson*, 406 Ill. 555, 94 N. E. 2d 349 (1950); *People* v. *Berne*, 384 Ill. 334,

suspect is pointed out before or during a lineup,[22] and that the participants in the lineup are asked to try on an article of clothing which fits only the suspect.[23]

The potential for improper influence is illustrated by the circumstances, insofar as they appear, surrounding the prior identifications in the three cases we decide today. In the present case, the testimony of the identifying witnesses elicited on cross-examination revealed that those witnesses were taken to the courthouse and seated in the courtroom to await assembly of the lineup. The courtroom faced on a hallway observable to the witnesses through an open door. The cashier testified that she saw Wade "standing in the hall" within sight of an FBI agent. Five or six other prisoners later appeared in the hall. The vice president testified that he saw a person in the hall in the custody of the agent who "resembled the person that we identified as the one that entered the bank."[24]

The lineup in *Gilbert, post,* was conducted in an auditorium in which some 100 witnesses to several alleged state and federal robberies charged to Gilbert made wholesale identifications of Gilbert as the robber in each others' presence, a procedure said to run counter to the most elemental precepts of the psychology of suggestion.[25] And the vice of suggestion created by

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51 N. E. 2d 578 (1943); *People* v. *Martin,* 304 Ill. 494, 136 N. E. 711 (1922); *Barrett* v. *State,* 190 Tenn. 366, 229 S. W. 2d 516 (1950).

[22] See *People* v. *Clark,* 28 Ill. 2d 423, 192 N. E. 2d 851 (1963); *Gillespie* v. *State,* 355 P. 2d 451, 454 (Okla. Cr. 1960).

[23] See *People* v. *Parham,* 60 Cal. 2d 378, 384 P. 2d 1001 (1963).

[24] See Wall., *supra,* n. 6, at 48; *Napley, supra,* n. 8, at 99; "[W]hile many identification parades are conducted by the police with scrupulous regard for fairness, it is not unknown for the identifying witness to be placed in a position where he can see the suspect before the parade forms . . . ."

[25] Williams & Hammelmann, Part I, *supra,* n. 8, at 486; Burtt, Applied Psychology 254–255.

the identification in *Stovall, post,* was the presentation to the witness of the suspect alone handcuffed to police officers. It is hard to imagine a situation more clearly conveying the suggestion to the witness that the one presented is believed guilty by the police. See Frankfurter, The Case of Sacco and Vanzetti 31–32.

The few cases that have surfaced therefore reveal the existence of a process attended with hazards of serious unfairness to the criminal accused and strongly suggest the plight of the more numerous defendants who are unable to ferret out suggestive influences in the secrecy of the confrontation. We do not assume that these risks are the result of police procedures intentionally designed to prejudice an accused. Rather we assume they derive from the dangers inherent in eyewitness identification and the suggestibility inherent in the context of the pretrial identification. Glanville Williams, in one of the most comprehensive studies of such forms of identification, said, "[T]he fact that the police themselves have, in a given case, little or no doubt that the man put up for identification has committed the offense, and that their chief preoccupation is with the problem of getting sufficient proof, because he has not 'come clean,' involves a danger that this persuasion may communicate itself even in a doubtful case to the witness in some way . . . ." Williams & Hammelmann, Identification Parades, Part I, [1963] Crim. L. Rev. 479, 483.

Insofar as the accused's conviction may rest on a courtroom identification in fact the fruit of a suspect pretrial identification which the accused is helpless to subject to effective scrutiny at trial, the accused is deprived of that right of cross-examination which is an essential safeguard to his right to confront the witnesses against him. *Pointer* v. *Texas,* 380 U. S. 400. And even though cross-examination is a precious safeguard

to a fair trial, it cannot be viewed as an absolute assurance of accuracy and reliability. Thus in the present context, where so many variables and pitfalls exist, the first line of defense must be the prevention of unfairness and the lessening of the hazards of eyewitness identification at the lineup itself. The trial which might determine the accused's fate may well not be that in the courtroom but that at the pretrial confrontation, with the State aligned against the accused, the witness the sole jury, and the accused unprotected against the overreaching, intentional or unintentional, and with little or no effective appeal from the judgment there rendered by the witness—"that's the man."

Since it appears that there is grave potential for prejudice, intentional or not, in the pretrial lineup, which may not be capable of reconstruction at trial, and since presence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial,[26] there can be

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[26] One commentator proposes a model statute providing not only for counsel, but other safeguards as well:

"Most, if not all, of the attacks on the lineup process could be averted by a uniform statute modeled upon the best features of the civilian codes. Any proposed statute should provide for the right to counsel during any lineup or during any confrontation. Provision should be made that any person, whether a victim or a witness, must give a description of the suspect before he views any arrested person. A written record of this description should be required, and the witness should be made to sign it. This written record would be available for inspection by defense counsel for copying before the trial and for use at the trial in testing the accuracy of the identification made during the lineup and during the trial.

"This ideal statute would require at least six persons in addition to the accused in a lineup, and these persons would have to be of approximately the same height, weight, coloration of hair and skin, and bodily types as the suspect. In addition, all of these men should, as nearly as possible, be dressed alike. If distinctive garb was used during the crime, the suspect should not be forced to wear similar clothing in the lineup unless all of the other persons are

little doubt that for Wade the post-indictment lineup was a critical stage of the prosecution at which he was "as much entitled to such aid [of counsel] . . . as at the trial itself." *Powell* v. *Alabama*, *supra*, at 57. Thus both Wade and his counsel should have been notified of the impending lineup, and counsel's presence should have been a requisite to conduct of the lineup, absent an "intelligent waiver." See *Carnley* v. *Cochran*, 369 U. S. 506. No substantial countervailing policy considerations have been advanced against the requirement of the presence of counsel. Concern is expressed that the requirement will forestall prompt identifications and result in obstruction of the confrontations. As for the first, we note that in the two cases in which the right to counsel is today held to apply, counsel had already been appointed and no argument is made in either case that

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similarly garbed: A complete written report of the names, addresses, descriptive details of the other persons in the lineup, and of everything which transpired during the identification would be mandatory. This report would include everything stated by the identifying witness during this step, including any reasons given by him as to what features, etc., have sparked his recognition.

"This statute should permit voice identification tests by having each person in the lineup repeat identical innocuous phrases, and it would be impermissible to force the use of words allegedly used during a criminal act.

"The statute would enjoin the police from suggesting to any viewer that one or more persons in the lineup had been arrested as a suspect. If more than one witness is to make an identification, each witness should be required to do so separately and should be forbidden to speak to another witness until all of them have completed the process.

"The statute could require the use of movie cameras and tape recorders to record the lineup process in those states which are financially able to afford these devices. Finally, the statute should provide that any evidence obtained as the result of a violation of this statute would be inadmissible." Murray, The Criminal Lineup at Home and Abroad, 1966 Utah L. Rev. 610, 627–628.

notice to counsel would have prejudicially delayed the confrontations. Moreover, we leave open the question whether the presence of substitute counsel might not suffice where notification and presence of the suspect's own counsel would result in prejudicial delay.[27] And to refuse to recognize the right to counsel for fear that counsel will obstruct the course of justice is contrary to the basic assumptions upon which this Court has operated in Sixth Amendment cases. We rejected similar logic in *Miranda* v. *Arizona* concerning presence of counsel during custodial interrogation, 384 U. S., at 480:

> "[A]n attorney is merely exercising the good professional judgement he has been taught. This is not cause for considering the attorney a menace to law enforcement. He is merely carrying out what he is sworn to do under his oath—to protect to the extent of his ability the rights of his client. In fulfilling this responsibility the attorney plays a vital role in the administration of criminal justice under our Constitution."

In our view counsel can hardly impede legitimate law enforcement; on the contrary, for the reasons expressed, law enforcement may be assisted by preventing the infiltration of taint in the prosecution's identification evidence.[28] That result cannot help the guilty avoid

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[27] Although the right to counsel usually means a right to the suspect's own counsel, provision for substitute counsel may be justified on the ground that the substitute counsel's presence may eliminate the hazards which render the lineup a critical stage for the presence of the suspect's *own* counsel.

[28] Concern is also expressed that the presence of counsel will force divulgence of the identity of government witnesses whose identity the Government may want to conceal. To the extent that this is a valid or significant state interest there are police practices commonly used to effect concealment, for example, masking the face.

conviction but can only help assure that the right man has been brought to justice.[29]

Legislative or other regulations, such as those of local police departments, which eliminate the risks of abuse and unintentional suggestion at lineup proceedings and the impediments to meaningful confrontation at trial may also remove the basis for regarding the stage as "critical."[30] But neither Congress nor the federal authorities has seen fit to provide a solution. What we hold today "in no way creates a constitutional strait-

[29] Most other nations surround the lineup with safeguards against prejudice to the suspect. In England the suspect must be allowed the presence of his solicitor or a friend, *Napley*, *supra*, n. 7, at 98–99; Germany requires the presence of retained counsel; France forbids the confrontation of the suspect in the absence of his counsel; Spain, Mexico, and Italy provide detailed procedures prescribing the conditions under which confrontation must occur under the supervision of a judicial officer who sees to it that the proceedings are officially recorded to assure adequate scrutiny at trial. Murray, The Criminal Lineup at Home and Abroad, 1966 Utah L. Rev. 610, 621–627.

[30] Thirty years ago Wigmore suggested a "scientific method" of pretrial identification "to reduce the risk of error hitherto inherent in such proceedings." Wigmore, The Science of Judicial Proof 541 (3d ed. 1937). Under this approach, at least 100 talking films would be prepared of men from various occupations, races, etc. Each would be photographed in a number of stock movements, with and without hat and coat, and would read aloud a standard passage. The suspect would be filmed in the same manner. Some 25 of the films would be shown in succession in a special projection room in which each witness would be provided an electric button which would activate a board backstage when pressed to indicate that the witness had identified a given person. Provision would be made for the degree of hesitancy in the identification to be indicated by the number of presses. *Id.*, at 540–541. Of course, the more systematic and scientific a process or proceeding, including one for purposes of identification, the less the impediment to reconstruction of the conditions bearing upon the reliability of that process or proceeding at trial. See discussion of fingerprint and like tests, Part III, *supra*, and of handwriting exemplars in *Gilbert* v. *California*, *post*.

jacket which will handicap sound efforts at reform, nor is it intended to have this effect." *Miranda* v. *Arizona*, *supra*, at 467.

V.

We come now to the question whether the denial of Wade's motion to strike the courtroom identification by the bank witnesses at trial because of the absence of his counsel at the lineup required, as the Court of Appeals held, the grant of a new trial at which such evidence is to be excluded. We do not think this disposition can be justified without first giving the Government the opportunity to establish by clear and convincing evidence that the in-court identifications were based upon observations of the suspect other than the lineup identification. See *Murphy* v. *Waterfront Commission*, 378 U. S. 52, 79, n. 18.[31] Where, as here, the admissibility of evidence of the lineup identification itself is not involved, a *per se* rule of exclusion of courtroom identification would be unjustified.[32] See *Nardone* v. *United States*, 308 U. S. 338, 341. A rule limited solely to the exclusion of testimony concerning identification at the lineup itself, without regard to admissibility of the courtroom identification, would render the right to counsel an empty one. The lineup is most often used, as in the present case, to crystallize the witnesses' identification of the defendant for future reference. We have already noted that the

[31] See *Goldstein* v. *United States*, 316 U. S. 114, 124, n. 1 (Murphy, J., dissenting). "[A]fter an accused sustains the initial burden, imposed by *Nardone* v. *United States*, 308 U. S. 338, of proving to the satisfaction of the trial judge in the preliminary hearing that wire-tapping was unlawfully employed, as petitioners did here, it is only fair that the burden should then shift to the Government to convince the trial judge that the proof had an independent origin."

[32] We reach a contrary conclusion in *Gilbert* v. *California*, *post*, as to the admissibility of the witness' testimony that he also identified the accused at the lineup.

lineup identification will have that effect. The State may then rest upon the witnesses' unequivocal courtroom identification, and not mention the pretrial identification as part of the State's case at trial. Counsel is then in the predicament in which Wade's counsel found himself—realizing that possible unfairness at the lineup may be the sole means of attack upon the unequivocal courtroom identification, and having to probe in the dark in an attempt to discover and reveal unfairness, while bolstering the government witness' courtroom identification by bringing out and dwelling upon his prior identification. Since counsel's presence at the lineup would equip him to attack not only the lineup identification but the courtroom identification as well, limiting the impact of violation of the right to counsel to exclusion of evidence only of identification at the lineup itself disregards a critical element of that right.

We think it follows that the proper test to be applied in these situations is that quoted in *Wong Sun* v. *United States*, 371 U. S. 471, 488, "Whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Maguire, Evidence of Guilt 221 (1959). See also *Hoffa* v. *United States*, 385 U. S. 293, 309. Application of this test in the present context requires consideration of various factors; for example, the prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification. It is also relevant to consider those facts which, despite

the absence of counsel, are disclosed concerning the conduct of the lineup.[33]

We doubt that the Court of Appeals applied the proper test for exclusion of the in-court identification of the two witnesses. The court stated that "it cannot be said with any certainty that they would have recognized appellant at the time of trial if this intervening lineup had not occurred," and that the testimony of the two witnesses "may well have been colored by the illegal procedure and was prejudicial." 358 F. 2d, at 360. Moreover, the court was persuaded, in part, by the "compulsory verbal responses made by Wade at the instance of the Special Agent." *Ibid.* This implies the erroneous holding that Wade's privilege against self-incrimination was violated so that the denial of counsel required exclusion.

On the record now before us we cannot make the determination whether the in-court identifications had an independent origin. This was not an issue at trial, although there is some evidence relevant to a determination. That inquiry is most properly made in the District Court. We therefore think the appropriate procedure to be followed is to vacate the conviction pending a hearing to determine whether the in-court identifications

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[33] Thus it is not the case that "[i]t matters not how well the witness knows the suspect, whether the witness is the suspect's mother, brother, or long-time associate, and no matter how long or well the witness observed the perpetrator at the scene of the crime." Such factors will have an important bearing upon the true basis of the witness' in-court identification. Moreover, the State's inability to bolster the witness' courtroom identification by introduction of the lineup identification itself, see *Gilbert* v. *California*, *post*, will become less significant the more the evidence of other opportunities of the witness to observe the defendant. Thus where the witness is a "kidnap victim who has lived for days with his abductor" the value to the State of admission of the lineup identification is indeed marginal, and such identification would be a mere formality.

had an independent source, or whether, in any event, the introduction of the evidence was harmless error, *Chapman* v. *California*, 386 U. S. 18, and for the District Court to reinstate the conviction or order a new trial, as may be proper. See *United States* v. *Shotwell Mfg. Co.*, 355 U. S. 233, 245–246.

The judgment of the Court of Appeals is vacated and the case is remanded to that court with direction to enter a new judgment vacating the conviction and remanding the case to the District Court for further proceedings consistent with this opinion.

It is so ordered.

THE CHIEF JUSTICE joins the opinion of the Court except for Part I, from which he dissents for the reasons expressed in the opinion of MR. JUSTICE FORTAS.

MR. JUSTICE DOUGLAS joins the opinion of the Court except for Part I. On that phase of the case he adheres to the dissenting views in *Schmerber* v. *California*, 384 U. S. 757, 772–779, that compulsory lineup violates the privilege against self-incrimination contained in the Fifth Amendment.

SUPREME COURT OF THE UNITED STATES

No. 334.—October Term, 1966.

United States, Petitioner, v. Billy Joe Wade. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June 12, 1967.]

Mr. Justice Clark, concurring.

With reference to the lineup point involved in this case I cannot, for the life of me, see why a lineup is not a critical stage of the prosecution. Identification of the suspect—a prerequisite to establishment of guilt—occurs at this stage, and with *Miranda* v. *Arizona*, 384 U. S. 436 (1966), on the books, the requirement of the presence of counsel arises, unless waived by the suspect. I dissented in *Miranda* but I am bound by it now, as we all are. *Schmerber* v. *California*, 384 U. S. 757 (1966), precludes petitioner's claim of self-incrimination. I therefore join the opinion of the Court.

SUPREME COURT OF THE UNITED STATES

No. 334.—October Term, 1966.

United States, Petitioner, v. Billy Joe Wade. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June 12, 1967.]

Mr. Justice Black, dissenting in part and concurring in part.

On March 23, 1965, respondent Wade was indicted for robbing a bank; on April 2, he was arrested; and on April 26, the court appointed a lawyer to represent him. Fifteen days later, while Wade was still in custody, an FBI agent took him and several other prisoners into a room at the courthouse, directed each to participate in a lineup wearing strips of tape on his face and to speak the words used by the robber at the bank. This was all done in order to let the bank employee witnesses look at Wade for identification purposes. Wade's lawyer was neither notified of nor present at the lineup to protect his client's interests. At Wade's trial, two bank employees identified him in the courtroom. Wade objected to this testimony, when, on cross-examination, his counsel elicited from these witnesses the fact that they had seen Wade in the lineup. He contended that by forcing him to participate in the lineup, wear strips of tape on his face, and repeat the words used by the robber, all without counsel, the Government had (1) compelled him to be a witness against himself in violation of the Fifth Amendment, and (2) deprived him of the assistance of counsel for his defense in violation of the Sixth Amendment.

The Court in Part I of its opinion rejects Wade's Fifth Amendment contention. From that I dissent. In Parts II–IV of its opinion, the Court sustains Wade's claim of denial of right to counsel in the out-of-court lineup, and in that I concur. In Part V, the Court remands the case to the District Court to consider whether the courtroom identification of Wade was the fruit of the illegal lineup, and if it were, to grant him a new trial unless the court concludes that the courtroom identification was harmless error. I would reverse the Court of Appeals' reversal of Wade's conviction, but I would not remand for further proceedings. Since the prosecution did not use the out-of-court lineup identification against Wade at his trial, I believe the conviction should be affirmed.

I.

In rejecting Wade's claim that his privilege against self-incrimination was violated by compelling him to appear in the lineup wearing the tape and uttering the words given him by the police, the Court relies on the recent holding in *Schmerber* v. *California*, 384 U. S. 757. In that case the Court held that taking blood from a man's body against his will in order to convict him of a crime did not compel him to be a witness against himself. I dissented from that holding, 384 U. S., at 773, and still dissent. The Court's reason for its holding was that the sample of Schmerber's blood taken in order to convict him of crime was neither "testimonial" nor "communicative" evidence. I think it was both. It seems quite plain to me that the Fifth Amendment's Self-incrimination Clause was designed to bar the Government from forcing any person to supply proof of his own crime, precisely what Schmerber was forced to do when he was forced to supply his blood. The Government simply took his blood against his will and over his counsel's protest for the purpose of convicting him of crime.

So here, having Wade in its custody awaiting trial to see if he could or would be convicted of crime, the Government forced him to stand in a lineup, wear strips on his face, and speak certain words, in order to make it possible for government witnesses to identify him as a criminal. Had Wade been compelled to utter these or any other words in open court, it is plain that he would have been entitled to a new trial because of having been compelled to be a witness against himself. Being forced by Government to help convict himself and to supply evidence against himself by talking outside the courtroom is equally violative of his constitutional right not to be compelled to be a witness against himself. Consequently, because of this violation of the Fifth Amendment, and not because of my own personal view that the Government's conduct was "unfair," "prejudicial," or "improper," I would prohibit the prosecution's use of lineup identification at trial.

II.

I agree with the Court, in large part because of the reasons it gives, that failure to notify Wade's counsel that Wade was to be put in a lineup by government officers and to be forced to talk and wear tape on his face denied Wade the right to counsel in violation of the Sixth Amendment. Once again, my reason for this conclusion is solely the Sixth Amendment's guarantee that "the accused shall enjoy the right . . . to have the assistance of counsel for his defence." As this Court's opinion points out, "[t]he plain wording of this guarantee thus encompasses counsel's assistance whenever necessary to assure a meaningful 'defence.'" And I agree with the Court that a lineup is a "critical stage" of the criminal proceedings against an accused, because it is a stage at which the Government makes use of his custody to obtain crucial evidence against him. Besides counsel's presence at the lineup being necessary to protect the defendant's

specific constitutional rights to confrontation and the assistance of counsel at the trial itself, the assistance of counsel at the lineup is also necessary to protect the defendant's in-custody assertion of his privilege against self-incrimination, *Miranda* v. *Arizona*, 384 U. S. 436, for contrary to the Court, I believe that counsel may advise the defendant not to participate in the lineup or to participate only under certain conditions.

I agree with the Court that counsel's presence at the lineup is necessary to protect the accused's right to a "fair trial," only if by "fair trial" the Court means a trial in accordance with the "law of the land" as specifically set out in the Constitution. But there are implications in the Court's opinion that by a "fair trial" the Court means a trial which a majority of this Court deems to be "fair" and that a lineup is a "critical stage" only because the Court, now assessing the "innumerable dangers" which inhere in it, thinks it is such. That these implications are justified is evidenced by the Court's suggestion that "legislative or other regulations . . . which eliminate the abuse . . . at lineup proceedings . . . may also remove the basis for regarding the stage as 'critical.'" And it is clear from the Court's opinion in *Gilbert* v. *California*, *post*, that it is willing to make the Sixth Amendment's guarantee of right to counsel dependent on the Court's own view of whether a particular stage of the proceedings—though "critical" in the sense of the prosecution's gathering of evidence—is "critical" to the Court's own view of a "fair trial." I am wholly unwilling to make the specific constitutional right of counsel dependent on judges' vague and transitory notions of fairness and their equally transitory, though "practical," assessment of the "risk that . . . counsel's absence . . . might derogate from a fair trial." See *Pointer* v. *Texas*, 380 U. S. 400, 412 (concurring opinion of Goldberg, J.).

III.

I would reverse Wade's conviction without further ado had the prosecution at trial made use of his lineup identification either in place of courtroom identification or to bolster in a harmful manner crucial courtroom identification. But the prosecution here did neither of these things. After prosecution witnesses under oath identified Wade in the courtroom, it was the defense, and not the prosecution, which brought out the prior lineup identification. While stating that "a *per se* rule of exclusion of courtroom identification would be unjustified," the Court, nevertheless, remands this case for "a hearing to determine whether the in-court identifications had an independent source," or were the tainted fruits of the invalidly conducted lineup. From this holding I dissent.

In the first place, even if this Court has power to establish such a rule of evidence, I think the rule fashioned by the Court is unsound. The "taint"-"fruit" determination required by the Court involves more than considerable difficulty. I think it is practically impossible. How is a witness capable of probing the recesses of his mind to draw a sharp line between a courtroom identification due exclusively to an earlier lineup and a courtroom identification due to memory not based on the lineup? What kind of "clear and convincing evidence" can the prosecution offer to prove upon what particular events memories resulting in an in-court identification rest? How long will trials be delayed while judges turn psychologists to probe the subconscious minds of witnesses? All these questions are posed but not answered by the Court's opinion. In my view, the Fifth and Sixth Amendments are satisfied if the prosecution is precluded from using lineup identification as either an alternative to or corroboration of courtroom identification. If the

prosecution does neither and its witnesses under oath identify the defendant in the courtroom, then I can find no justification for stopping the trial in midstream to hold a lengthy "taint"-"fruit" hearing. The fact of and circumstances surrounding a prior lineup identification might be used by the defense to impeach the credibility of the in-court identifications, but not to exclude them completely.

But more important, there is no constitutional provision upon which I can rely that directly or by implication gives this Court power to establish what amounts to a constitutional rule of evidence to govern, not only the Federal Government, but the States in their trial of state crimes under state laws in state courts. See *Gilbert* v. *California, post.* The Constitution deliberately reposed in States very broad power to create and to try crimes according to their own rules and policies. *Spencer* v. *Texas,* 385 U. S. 554. Before being deprived of this power, the least that they can ask is that we should be able to point to a federal constitutional provision that either by express language or by necessary implication grants us the power to fashion this novel rule of evidence to govern their criminal trials. Cf. *Berger* v. *New York,* — U. S. — (BLACK, J., dissenting). Neither *Nardone* v. *United States,* 308 U. S. 338, nor *Wong Sun* v. *United States,* 371 U. S. 471, both federal cases and both decided "in other contexts," support what the Court demands of the States today.

Perhaps the Court presumes to write this constitutional rule of evidence on the Fourteenth Amendment's Due Process Clause. This is not the time or place to consider that claim. Suffice it for me to say briefly that I find no such authority in the Due Process Clause. It undoubtedly provides that a person must be tried in accordance with the "Law of the Land." Consequently, it violates due process to try a person in a way prohibited

by the Fourth, Fifth, or Sixth Amendments of our written Constitution. But I have never been able to subscribe to the dogma that the Due Process Clause empowers this Court to declare any law, including a rule of evidence, unconstitutional which it believes is contrary to tradition, decency, fundamental justice, or any of the other wide-meaning words used by judges to claim power under the Due Process Clause. See, *e. g.*, *Rochin* v. *California*, 342 U. S. 165. I have an abiding idea that if the Framers had wanted to let judges write the Constitution on any such day-to-day beliefs of theirs, they would have said so instead of so carefully defining their grants and prohibitions in a written constitution. With no more authority than the Due Process Clause I am wholly unwilling to tell the state or federal courts that the United States Constitution forbids them to allow courtroom identification without the prosecution first proving that the identification does not rest in whole or in part on an illegal lineup. Should I do so, I would feel that we are deciding what the Constitution is, not from what is says, but from what we think it would have been wise for the Framers to put in it. That to me would be "judicial activism" at its worst. I would leave the States and Federal Government free to decide their own rules of evidence. That, I believe, is their constitutional prerogative.

I would affirm Wade's conviction.

SUPREME COURT OF THE UNITED STATES

No. 334.—October Term, 1966.

United States, Petitioner, v. Billy Joe Wade. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June 12, 1967.]

Mr. Justice White, whom Mr. Justice Harlan and Mr. Justice Stewart join, dissenting in part and concurring in part.

The Court has again propounded a broad constitutional rule barring use of a wide spectrum of relevant and probative evidence, solely because a step in its ascertainment or discovery occurs outside the presence of defense counsel. This was the approach of the Court in *Miranda* v. *Arizona*. I objected then to what I thought was an uncritical and doctrinaire approach without satisfactory factual foundation. I have much the same view of the present ruling and therefore dissent from the judgment and from Parts II, IV, and V of the Court's opinion.

The Court's opinion is far reaching. It proceeds first by creating a new *per se* rule of constitutional law: a criminal suspect cannot be subjected to a pretrial identification process in the absence of his counsel without violating the Sixth Amendment. If he is, the State may not buttress a later courtroom identification of the witness by any reference to the previous identification. Furthermore, the courtroom identification is not admissible at all unless the State can establish by clear and convincing proof that the testimony is not the fruit of the earlier identification made in the absence of defendant's counsel—admittedly a heavy burden for the State and probably an impossible one. For all intents and purposes, courtroom identifications are barred if pre-

trial identifications have occurred without counsel being present.

The rule applies to any lineup, to any other techniques employed to produce an identification and *a fortiori* to a face-to-face encounter between the witness and the suspect alone, regardless of when the identification occurs, in time or place, and whether before or after indictment or information. It matters not how well the witness knows the suspect, whether the witness is the suspect's mother, brother, or long-time associate, and no matter how long or well the witness observed the perpetrator at the scene of the crime. The kidnap victim who has lived for days with his abductor is in the same category as the witness who had had only a fleeting glimpse of the criminal. Neither may identify the suspect without defendant's counsel being present. The same strictures apply regardless of the number of other witnesses who positively identify the defendant and regardless of the corroborative evidence showing that it was the defendant who has committed the crime.

The premise for the Court's rule is not the general unreliability of eyewitness identifications nor the difficulties inherent in observation, recall, and recognition. The Court assumes a narrower evil as the basis for its rule—improper police suggestion which contributes to erroneous identifications. The Court apparently believes that improper police procedures are so widespread that a broad prophylactic rule must be laid down, requiring the presence of counsel at all pretrial identifications, in order to detect recurring instances of police misconduct.[1] I do not share this pervasive distrust of all official investigations. None of the materials the Court relies upon

[1] Yet in *Stovall* v. *Denno*, — U. S. —, the Court recognizes that improper police conduct in the identification process has not been so widespread as to justify full retroactivity for its new rule.

supports it.[2] Certainly, I would bow to solid fact, but the Court quite obviously does not have before it any reliable, comprehensive survey of current police practices on which to base its new rule. Until it does, the Court should avoid excluding relevant evidence from state criminal trials. Cf. *Washington* v. *Texas*, — U. S. —.

The Court goes beyond assuming that a great majority of the country's police departments are following improper practices at pretrial identifications. To find the lineup a "critical" stage of the proceeding and to exclude identifications made in the absence of counsel, the Court must also assume that police "suggestion," if it occurs at all, leads to erroneous rather than accurate identifications and that reprehensible police conduct will have an unavoidable and largely undiscoverable impact on the trial. This in turn assumes that there is now no adequate source from which defense counsel can learn about the circumstances of the pretrial identification in order to place before the jury all of the considerations which should enter into an appraisal of courtroom identification evidence. But these are treacherous and unsupported assumptions,[3] resting as they do on the notion that the

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[2] In *Miranda* v. *Arizona*, 384 U. S. 436, 449, the Court noted that O'Hara, Fundamentals of Criminal Investigation (1956) is a text that has enjoyed extensive use among law enforcement agencies and among students of police science. The quality of the work was said to rest on the author's long service as observer, lecturer in police science, and work as a federal crime investigator. O'Hara does not suggest that the police should or do use identification machinery improperly; instead he argues for techniques that would increase the reliability of eyewitness identifications, and there is no reason to suggest that O'Hara's views are not shared and practiced by the majority of police departments throughout the land.

[3] The instant case and its companions, *Gilbert* v. *California*, — U. S. —, and *Stovall* v. *Denno*, — U. S. —, certainly lend no support to the Court's assumptions. The police conduct deemed improper by the Court in the three cases seems to have come to light at trial in the ordinary course of events. One can ask what

defendant will not be aware, that the police and the witnesses will forget or prevaricate, that defense counsel will be unable to bring out the truth and that neither jury, judge, nor appellate court is a sufficient safeguard against unacceptable police conduct occurring at a pretrial identification procedure. I am unable to share the Court's view of the willingness of the police and the ordinary citizen-witness to dissemble, either with respect to the identification of the defendant or with respect to the circumstances surrounding a pretrial identification.

There are several striking aspects to the Court's holding. First, the rule does not bar courtroom identifications where there have been no previous identifications in the presence of the police, although when identified in the courtroom, the defendant is known to be in custody and charged with the commission of a crime. Second, the Court seems to say that if suitable legislative standards were adopted for the conduct of pretrial identifications, thereby lessening the hazards in such confrontations, it would not insist on the presence of counsel. But if this is true, why does not the Court simply fashion what it deems to be constitutionally acceptable procedures for the authorities to follow? Certainly the Court is correct in suggesting that the new rule will be wholly inapplicable where police departments themselves have established suitable safeguards.

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more counsel would have learned at the pretrial identifications that would have been relevant for truth determination at trial. When the Court premises its constitutional rule on police conduct so subtle as to defy description and subsequent disclosure it deals in pure speculation. If police conduct is intentionally veiled, the police will know about it, and I am unwilling to speculate that defense counsel at trial will be unable to reconstruct the known circumstances of the pretrial identification. And if the "unknown" influence on identifications is "innocent," the Court's general premise evaporates and the problem is simply that of the inherent shortcomings of eyewitness testimony.

Third, courtroom identification may be barred, absent counsel at a prior identification, regardless of the extent of counsel's information concerning the circumstances of the previous confrontation between witness and defendant—apparently even if there were recordings or sound-movies of the events as they occurred. But if the rule is premised on the defendant's right to have his counsel know, there seems little basis for not accepting other means to inform. A disinterested observer, recordings, photographs—any one of them would seem adequate to furnish the basis for a meaningful cross-examination of the eye-witness who identifies the defendant in the courtroom.

I share the Court's view that the criminal trial, at the very least, should aim at truthful factfinding, including accurate eyewitness identifications. I doubt, however, on the basis of our present information, that the tragic mistakes which have occurred in criminal trials are as much the product of improper police conduct as they are the consequence of the difficulties inherent in eyewitness testimony and in resolving evidentiary conflicts by court or jury. I doubt that the Court's new rule will obviate these difficulties, or that the situation will be measurably improved by inserting defense counsel into the investigative processes of police departments everywhere.

But, it may be asked, what possible state interest militates against requiring the presence of defense counsel at lineups? After all, the argument goes, he *may* do some good, he *may* upgrade the quality of identification evidence in state courts and he can scarcely do any harm. Even if true, this is a feeble foundation for fastening an ironclad constitutional rule upon state criminal procedures. Absent some reliably established constitutional violation, the processes by which the States enforce their criminal laws are their own prerogative. The States *do* have an interest in conducting

their own affairs, an interest which cannot be displaced simply by saying that there are no valid arguments with respect to the merits of a federal rule emanating from this Court.

Beyond this, however, requiring counsel at pretrial identifications as an invariable rule trenches on other valid state interests. One of them is its concern with the prompt and efficient enforcement of its criminal laws. Identifications frequently take place after arrest but before indictment or information is filed. The police may have arrested a suspect on probable cause but may still have the wrong man. Both the suspect and the State have every interest in a prompt identification at that stage, the suspect in order to secure his immediate release and the State because prompt and early identification enhances *accurate* identification and because it must know whether it is on the right investigative track. Unavoidably, however, the absolute rule requiring the presence of counsel will cause significant delay and it may very well result in no pretrial identification at all. Counsel must be appointed and a time arranged convenient for him and the witnesses. Meanwhile, it may be necessary to file charges against the suspect who may then be released on bail, in the federal system very often on his own recognizance, with neither the State nor the defendant having the benefit of a properly conducted identification procedure.

Nor do I think the witnesses themselves can be ignored. They will now be required to be present at the convenience of counsel rather than their own. Many may be much less willing to participate if the identification stage is transformed into an adversary proceeding not under the control of a judge. Others may fear for their own safety if their identity is known at an early date, especially when there is no way of knowing until

the lineup occurs whether or not the police really have the right man.[4]

Finally, I think the Court's new rule is vulnerable in terms of its own unimpeachable purpose of increasing the reliability of identification testimony.

Law enforcement officers have the obligation to convict the guilty and to make sure they do not convict the innocent. They must be dedicated to making the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of the crime.[5] To this extent, our so-called adversary system is not adversary at all; nor should it be. But defense counsel has no comparable obligation to ascertain or present the truth. Our system assigns him a different mission. He must be and is interested in not convicting the innocent, but, absent a voluntary plea of guilty, we also insist that he defend his client whether he is innocent or guilty. The

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[4] I would not have thought that the State's interest regarding its sources of identification is any less than its interest in protecting informants, especially those who may aid in identification but who will not be used as witnesses. See *McCray* v. *Illinois*, — U. S. —.

[5] "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger* v. *United States*, 295 U. S. 78, 88. See also *Mooney* v. *Holohan*, 294 U. S. 103; *Pyle* v. *Kansas*, 317 U. S. 213; *Alcorta* v. *Texas*, 355 U. S. 28; *Napue* v. *Illinois*, 360 U. S. 264; *Brady* v. *Maryland*, 373 U. S. 83; *Giles* v. *Maryland*, — U. S. —; *Miller* v. *Pate*, — U. S. —.

State has the obligation to present the evidence. Defense counsel need present nothing, even if he knows what the truth is. He need furnish no witnesses to the police, reveal any confidences of his client, nor furnish any other information to help the prosecution's case. If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course.[6] Our interest in not con-

[6] One point of view about the role of the courtroom lawyer appears in Frank, Courts on Trial 82–83. "What is the role of the lawyers in bringing the evidence before the trial court? As you may learn by reading any one of a dozen or more handbooks on how to try a law-suit, an experienced lawyer uses all sorts of stratagems to minimize the effect on the judge or jury of testimony disadvantageous to his client, even when the lawyer has no doubt of the accuracy and honesty of that testimony. . . . If such a witness happens to be timid, frightened by the unfamiliarity of court-room ways, the lawyer, in his cross-examination, plays on that weakness, in order to confuse the witness and make it appear that he is concealing significant facts. Longenecker, in his book *Hints On The Trial of a Law Suit* (a book endorsed by the great Wigmore), in writing of the 'truthful, honest, over-cautious' witness, tells how 'a skilful advocate by a rapid cross-examination may ruin the testimony of such a witness.' The author does not even hint any disapproval of that accomplishment. Longenecker's and other similar books recommend that a lawyer try to prod an irritable but honest 'adverse' witness into displaying his undesirable characteristics in their most unpleasant form, in order to discredit him with the judge or jury. 'You may,' writes Harris, 'sometimes destroy the effect of an adverse witness by making him appear more hostile than he really is. You may make him exaggerate or unsay something and say it again.' Taft says that a clever cross-examiner, dealing with an honest but egotistic witness, will 'deftly tempt the witness to indulge in his propensity for exaggeration, so as to make him "hang himself." And thus,' adds Taft, 'it may happen that not only is the value of his testimony lost, but the side which produces him suffers for seeking aid from such a source'—although, I would add, that may be the only source of evidence of a fact on which the decision will turn.

"'An intimidating manner in putting questions,' writes Wigmore, 'may so coerce or disconcert the witness that his answers do not

victing the innocent permits counsel to put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth. Undoubtedly there are some limits which defense counsel must observe[7] but more often than not, defense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness who he thinks is lying. In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth.

I would not extend this system, at least as it presently operates, to police investigations and would not require counsel's presence at pretrial identification procedures. Counsel's interest is in not having his client placed at the scene of the crime, regardless of his whereabouts. Some counsel may advise their clients to refuse to make any movements or to speak any words in a lineup or even to appear in one. To that extent the impact on truthful factfinding is quite obvious. Others will not only observe what occurs and develop possibilities for later

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represent his actual knowledge on the subject. So also, questions which in form or subject cause embarrassment, shame or anger in the witness may unfairly lead him to such demeanor or utterances that the impression produced by his statements does not do justice to its real testimonial value.'"

[7] See the materials collected in c. 3 of Countryman and Finman, The Lawyer in Modern Society; Joint Committee on Continuing Legal Education of American Law Institute and the American Bar Association, The Problem of a Criminal Defense (1961), pp. 1–46; Stovall, 'Aspects of the Advocate's Dual Responsibility, 22 The Alabama Lawyer 66; Gold, Split Loyalty: An Ethical Problem for the Criminal Defense Lawyer, 14 Clev.-Mar. L. Rev. 65; Symposium on Professional Ethics, 64 Mich. L. Rev. 1469–1498.

cross-examination but will hover over witnesses and begin their cross-examination then, menacing truthful fact-finding as thoroughly as the Court fears the police now do. Certainly there is an implicit invitation to counsel to suggest rules for the lineup and to manage and produce it as best he can. I therefore doubt that the Court's new rule, at least absent some clearly defined limits on counsel's role, will measurably contribute to more reliable pretrial identifications. My fears are that it will have precisely the opposite result. It may well produce fewer convictions, but that is hardly a proper measure of its long-run acceptability. In my view, the State is entitled to investigate and develop its case outside the presence of defense counsel. This includes the right to have private conversations with identification witnesses, just as defense counsel may have his own consultations with these and other witnesses without having the prosecutor present.

Whether today's judgment would be an acceptable exercise of supervisory power over federal courts is another question. But as a constitutional matter, the judgment in this case is erroneous and although I concur in Parts I and III of the Court's opinion I respectfully register this dissent.

SUPREME COURT OF THE UNITED STATES

No. 334.—October Term, 1966.

United States, Petitioner, v. Billy Joe Wade. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June 12, 1967.]

Mr. Justice Fortas, with whom The Chief Justice and Mr. Justice Douglas join, concurring in part and dissenting in part.

1. I agree with the Court that the exhibition of the person of the accused at a lineup is not itself a violation of the privilege against self-incrimination. In itself, it is no more subject to constitutional objection than the exhibition of the person of the accused in the courtroom for identification purposes. It is an incident of the State's power to arrest, and a reasonable and justifiable aspect of the State's custody resulting from arrest. It does not require that the accused take affirmative, volitional action, but only that, having been duly arrested he may be seen for identification purposes. It is, however, a "critical stage" in the prosecution, and I agree with the Court that the opportunity to have counsel present must be made available.

2. In my view, however, the accused may not be compelled in a lineup to speak the words uttered by the person who committed the crime. I am confident that it could not be compelled in court. It cannot be compelled in a lineup. It is more than passive, mute assistance to the eyes of the victim or of witnesses. It is the kind of volitional act—the kind of forced cooperation by the accused—which is within the historical perimeter of the privilige against compelled self-incrimination.

Our history and tradition teach and command that an accused may stand mute. The privilege means

just that; not less than that. According to the Court, an accused may be jailed—indefinitely—until he is willing to say, for an identifying audience, whatever was said in the course of the commission of the crime. Presumably this would include, "Your money or your life"—or perhaps, words of assault in a rape case. This is intolerable under our constitutional system.

I completely agree that the accused must be advised of and given the right to counsel before a lineup—and I join in that part of the Court's opinion; but this is an empty right unless we mean to insist upon the accused's fundamental constitutional immunities. One of these is that the accused may not be compelled to speak. To compel him to speak would violate the privilege against self-incrimination, which is incorporated in the Fifth Amendment.

This great privilege is not merely a shield for the accused. It is also a prescription of technique designed to guide the State's investigation. History teaches us that self-accusation is an unreliable instrument of detection, apt to inculpate the innocent-but-weak and to enable the guilty to escape. But this is not the end of the story. The privilege historically goes to the roots of democratic and religious principle. It prevents the debasement of the citizen which would result from compelling him to "accuse" himself before the power of the state. The roots of the privilege are deeper than the rack and the screw used to extort confessions. They go to the nature of a free man and to his relationship to the state.

An accused cannot be compelled to utter the words spoken by the criminal in the course of the crime. I thoroughly disagree with the Court's statement that such compulsion does not violate the Fifth Amendment. The Court relies upon *Schmerber* v. *California*, 384

U. S. 757 (1966), to support this. I dissented in *Schmerber*, but if it were controlling here, I should, of course, acknowledge its binding effect unless we were prepared to overrule it. But *Schmerber* which authorized the forced extraction of blood from the veins of an unwilling human being, did not compel the person actively to cooperate—to accuse himself by a volitional act which differs only in degree from compelling him to act out the crime, which, I assume, would be rebuffed by the Court. It is the latter feature which places the compelled utterance by the accused squarely within the history and noble purpose of the Fifth Amendment's commandment.

To permit *Schmerber* to apply in any respect beyond its holding is, in my opinion, indefensible. To permit its insidious doctrine to extend beyond the invasion of the body, which it permits, to compulsion of the will of a man, is to deny and defy a precious part of our historical faith and to discard one of the most profoundly cherished instruments by which we have established the freedom and dignity of the individual. We should not so alter the balance between the rights of the individual and of the state, achieved over centuries of conflict.

3. While the Court holds that the accused must be advised of and given the right to counsel at the lineup, it makes the privilege meaningless in this important respect. Unless counsel has been waived or, being present, has not objected to the accused's utterance of words used in the course of committing the crime, to compel such an utterance is constitutional error.*

*While it is conceivable that legislation might provide a meticulous lineup procedure which would *satisfy* constitutional requirements, I do not agree with the Court that this would "remove the basis for regarding the [line-up] stage as 'critical.'"

Accordingly, while I join the Court in requiring vacating of the judgment below for a determination as to whether the identification of respondent was based upon factors independent of the lineup, I would do so not only because of the failure to offer counsel before the lineup but also because of the violation of respondent's Fifth Amendment rights.